(21,443.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 114.

A. SANDOVAL AND P. SANDOVAL, APPELLANTS,

vs.

EPES RANDOLPH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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No. 1028.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
EPES RANDOLPH, Appellee.

Record on Appeal.

3-4 In the Supreme Court of the Territory of Arizona.

No. 1028.

EPES RANDOLPH, Appellee,
vs.
A. SANDOVAL and P. SANDOVAL, Appellants.

Appeal from the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

Hon. Frederick S. Nave, Judge.

Abstract of Record.

E. S. Ives, Attorney for Appellee.
A. Orfila, Eb. Williams, Attorneys for Appellants.

Filed Nov. 29, 1907.

T. A. TRITLE, JR., *Clerk.*

5 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

EPES RANDOLPH, Plaintiff,
vs.
A. SANDOVAL and P. SANDOVAL, Defendants.

Complaint.

Now comes the plaintiff and complains of the defendants and alleges and avers:

I.

That plaintiff resides in the city of Tucson, county of Pima, Territory of Arizona; and the defendants reside in the town of Nogales, State of Sonora, Republic of Mexico.

6

II.

That in or about the spring of 1905, the plaintiff and one L. Lindsay entered into a contract with the defendants and each of them, whereby the defendants agreed as agents for the said Lindsay and the plaintiff, to negotiate with the owners of a certain mining claim in the Altar District, State of Sonora, Republic of Mexico, named the San Francisco, for the purchase of the said mining claim, for the use and benefit of the said Lindsay and the plaintiff, and to buy the same for the use and benefit of the said Lindsay and the plaintiff at the lowest possible price.

III.

That thereafter and in pursuance of such contract between the said defendants and the said Lindsay and the plaintiff, the said defendants did, acting under the said contract and as agents as aforesaid, negotiate with the owners of the said mining claim and did agree to purchase the said claim from the said owners and to pay therefor the sum of Twenty-thousand dollars ($20,000) Mexican silver; and the owners of the said claim agreed to convey the said mining claim to the said defendants for the said sum of Twenty-thousand dollars ($20,000) Mexican silver; and the said owners of the said claim, did in or about the spring of 1905, in further-

7 ance of said negotiations and agreement, convey the said claim to the defendants, and did receive from the said defendants the said sum of Twenty thousand dollars ($20,000) Mexican silver, and no more, and that the said conveyance was accepted by the said defendants for the use and benefit of the said Lindsay and the plaintiff under the said contract as aforesaid.

IV.

That the defendants with intent to deceive and defraud the said Lindsay and the plaintiff, did report and state to the said Lindsay and the plaintiff that they had agreed to purchase the same from the said owners of the said claim and to pay said owners therefor the sum of Twenty-thousand dollars ($20,000) American gold; and that said sum was the lowest sum for which they were able to purchase the same from the said owners; that the said Lindsay and the plaintiff relying upon the said statements of the defendants that they had agreed to give the owners of the said claim the sum of Twenty thousand dollars ($20,000) American gold for the same, and that the said claim could not be purchased for any sum less than the said sum of Twenty-thousand dollars ($20,000) American gold, did pay to the said defendants the sum of Twenty-thousand dol-

8 lars ($20,000) American gold; and that thereupon, and in pursuance of the said contract, the said defendants did make a conveyance of the said claim to a duly authorized agent of the said Lindsay and the plaintiff. That neither the said Lindsay nor the plaintiff discovered that the defendants had purchased the said claim for less than the sum of Twenty-thousand dollars ($20,000) gold until about the month of January, 1906.

V.

That at the date when the defendants paid the said sum of twenty-thousand dollars ($20,000) Mexican silver to the owners of the said claim, the said Twenty-thousand dollars ($20,000) Mexican silver was worth the sum of Nine thousand six hundred dollars ($9,600) gold and no more; and that by reason of the foregoing facts the defendants became indebted to the said Lindsay and the plaintiff in the sum of Ten Thousand Four Hundred dollars ($10,400) gold; and that they have not paid the same or any part thereof though often requested so to do.

VI.

That prior to the commencement of this action, the said Lindsay assigned to the plaintiff, all of his interest in the claim against the defendants hereinbefore set forth, and that the plaintiff is now the sole owner of the said claim.

9 Wherefore, plaintiff demands judgment against the defendants for the sum of Ten thousand four hundred dollars ($10,400) gold, with interest thereon from the 1st day of July, 1905, together with costs.

EUGENE S. IVES,
Attorney for Plaintiff.

Filed Nov. 26th, 1906.

[Title of Cause.]

Demurrer.

Defendants demur to the complaint of plaintiff herein, because—
1st. That the court has no jurisdiction of the person of the defendants, or of the subject of the action, in that, said complaint shows that plaintiff is a resident of Tucson in the county of Pima, Territory of Arizona, and that defendants are residents of Nogales, Sonora, Republic of Mexico.
2nd. That said action is based upon an alleged contract, but said complaint contains no allegation of the place of the making of such contract nor of the place at which it was to have been performed.

10 *Answer.*

The defendants answer the complaint of plaintiff herein and deny each and every allegation in the said complaint contained.
Wherefore, defendants ask that they be dismissed hence without prejudice and that they have judgment for their costs herein.

EB. WILLIAMS,
Attorney for Defendants.

Filed Feb. 12th, 1907.

[Title of Cause.]

Findings of Fact and Conclusions of Law.

The issues in this case having come on to be heard before the Honorable Frederick S. Nave on the 10th day of April, 1907, without a jury, and the plaintiff having offered evidence to establish the facts alleged in the complaint, and the defendants having offered evidence controverting such allegations and tending to establish the facts alleged in the answer, and the plaintiff having offered no evidence in rebuttal, and the case having been duly submitted, the court does now render its decision in writing separately stating the facts and conclusions of law and does find the following facts and conclusions of law:

11 *Facts.*

I.

In or about the spring of 1905, the defendants A. Sandoval and P. Sandoval entered into a certain agreement with the plaintiff and one Lycurgus Lindsay whereby the defendants agreed that they on behalf of the said plaintiff and the said Lindsay would undertake to purchase for them a certain mining claim called the San Francisco mine, in the Altar Mining District in the State of Sonora, Republic of Mexico, at the lowest possible price.

II.

Thereafter the said defendants in pursuance of such agreement and on behalf of the said Lindsay and this plaintiff, did purchase the said mining claim from the owners thereof, for the full consideration of twenty thousand dollars Mexican silver, and that the defendant P. Sandoval as co-partner of the defendant A. Sandoval, did thereupon obtain a deed of the said mining claim from the original owners thereof and did pay therefor the said sum of $20,000 Mexican silver and no more; and the said defendants did thereupon and in further pursuance of said agreement procure the said P. Sandoval to convey the said mining claim to one H. S. MacKay,
who was the agent of the plaintiff and of the said Lindsay;
12 and the said Lindsay and the plaintiff in pursuance of said
agreement and in the belief that the defendants had paid for the said mine the said sum of Twenty thousand dollars American gold, did pay to the defendants the said sum of Twenty thousand dollars American gold.

III.

The plaintiff and the said Lindsay paid the said sum of Twenty thousand dollars in gold in three separate installments, the last thereof being paid on the 25th day of May, 1906, for the sum of Twelve thousand dollars American gold.

IV.

The said sum of Twenty thousand dollars Mexican silver paid by the defendants to the original owners of the said mining claim was worth in American gold the sum of Ten thousand dollars at the time the said payments were made.

V.

The said Lycurgus Lindsay prior to the commencement of this action duly assigned his claim against the defendants arising out of the aforesaid transaction to the plaintiff for a valuable consideration.

Conclusions of Law.

The plaintiff is entitled to judgment against the defend-
13 ants for the sum of Ten thousand dollars American gold, with interest thereupon at the rate of six per cent per annum from the 25th day of May, 1906, together with the costs of this action.

FREDERICK S. NAVE, *Judge.*

Filed April 12th, 1907.

[Title of Cause.]

Judgment.

The issues in this case having come on to be heard before the Honorable Frederick S. Nave on the 10th day of April, 1907, sitting without a jury, and the plaintiff having offered evidence to establish the facts alleged in the complaint, and the defendants having offered evidence controverting such allegations and tending to establish the facts alleged in the answer, and the plaintiff having offered no evidence in rebuttal, and the case having been duly submitted and the court having rendered judgment in open court in favor of the plaintiff and against the defendants for the sum of Ten thousand dollars with interest from the 25th day of May, 1906, and duly filed its decision in writing separately stating the findings of fact and conclusions of law, and the interest having been computed to be the sum of $528.33,

14 Now, therefore, on motion of Eugene S. Ives, attorney for the plaintiff, it is

Ordered, adjudged and decreed, that the plaintiff recover of the defendants A. Sandoval and P. Sandoval, and each of them the sum of $10,528.33, together with the costs of this action.

FREDERICK S. NAVE, *Judge.*

Filed April 12th, 1907.

[Title of Cause.]

Motion for New Trial.

Come now the defendants, A. Sandoval and P. Sandoval, and move the court for a new trial of said cause, upon the following grounds:

I.

That the evidence is insufficient to justify or sustain the decision of the court, giving judgment for the plaintiff.

II.

That said decision is contrary to law.

III.

That the evidence does not sustain the judgment.

IV.

The court erred in admitting evidence over defendants' ob-
15 jections, and which ruling *were* duly excepted to.

V.

The court erred in rejecting evidence offered by these defendants.

VI.

That the evidence is insufficient to sustain the findings of the court, ordering judgment for the plaintiff.

VI-.

The court erred in refusing these defendants leave to amend their answer so as to plead the Statute of Limitations, as a bar, at the close of plaintiff's case.

Respectfully submitted,

EB. WILLIAMS AND
A. ORFILA,
Attorneys for Defendants.

Dated and filed April 11th, 1907.

Minute Entries.

Minute Entry, April 1, 1907.

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

EPES RANDOLPH, Plaintiff,
vs.
A. SANDOVAL and P. SANDOVAL, Defendants.

16 This cause came on for hearing at this time upon demurrer of defendant-, and the demurrer having been submitted duly it is by the court ordered that the same be overruled. Whereupon defendant- moved that an exception be entered in the minutes to said ruling of the court, which said motion is ordered granted by the court.

[Title of Cause.]

Upon an affidavit filed herein by Eugene S. Ives it is by the court ordered that a shorter time be prescribed for the giving of the notice of the taking of the deposition of witness Santiago Grijalva, and it is further ordered that the said deposition be taken before the clerk of the District Court of the county of Santa Cruz, in the court house in the town of Nogales, on the first day of April at four o'clock p. m.

[Title of Cause.]

Upon an affidavit filed herein by Eugene S. Ives, it is by the court ordered that a shorter time be prescribed for the giving of notice of the taking of the deposition of the witness Gerardo Ortiz, and it is further ordered that the said deposition be taken before the clerk of the District Court of the county of Santa Cruz, in the town of Nogales, on the first day of April, 1907, at four o'clock p. m.

17 [Title of Cause.]

Upon an affidavit filed herein by Eugene S. Ives, Esq., it is by the court ordered that a shorter time be prescribed for the giving of the notice of the taking of the deposition of the witness Ignacio Grijalva, and it is further ordered that the said deposition be taken before the clerk of the District Court of the county of Santa Cruz in the court house in the town of Nogales, of the first day of April, 1907, at four o'clock p. m.

[Title of Cause.]

Upon motion of plaintiff it is by the court ordered that this case be tried by a jury; and upon like motion it is by the court further ordered that this case be and is now set for trial, Monday, April 8, 1907, at 9:30 o'clock a. m.

Minute Entry, April 5, 1907.

[Title of Cause.]

Upon motion of defendants by their counsel, Eb. Williams, Esq., it is by the court ordered that Antonio Orfila, Esq., be and now is entered as associate counsel for defendants. And upon motion of plaintiff, by his counsel Eugene S. Ives, Esq., with consent of defendants, it is by the court ordered that the order heretofore entered herein be and the same is now vacated. And, upon motion of plaintiff it is by the court further ordered that this case be and is
18 now set for trial Wednesday, April 10th, 1907. And further upon motion of plaintiff it is by the court ordered that there be entered upon the record a withdrawal of the demand hereinbefore made that this case shall be tried by a jury.

Minute Entries, April 10, 1907.

[Title of Cause.]

This cause having been set for trial at this time: Come now the defendants herein, by their counsel, Eb. Williams, Esq., and Antonio Orfila, Esq., and present a motion that the order heretofore made herein be now vacated, and that trial of this cause be now postponed until Thursday, April 11th, A. D. 1907. Which said motion is supported by two affidavits filed herein, which said motion is by the court ordered overruled and denied.

[Title of Cause.]

This cause having been set for trial at this time, come now the respective parties herein, the plaintiff Epes Randolph in person, together with his counsel Eugene S. Ives and Frank J. Duffy, Esq., and the defendant P. Sandoval in person, together with defendants' counsel, Eb. Williams, Esq., and Antonio Orfila, Esq., into open court; and both parties answering "Ready for Trial," the issue being joined and the court sitting without a jury, the trial
19 now proceeds upon the pleadings and the evidence, as follows to wit:

The pleadings herein are submitted and read by the court: Whereupon the plaintiff to maintain upon his part the issue herein, calls as a witness P. Sandoval, one of the defendants herein, for cross-examination, under provision of Section 2504 of the Civil Code of Arizona, and said witness is sworn and duly examined.

Whereupon to maintain further upon his part the issues herein plaintiff offers in evidence the deposition- of Lycurgus Lindsay and H. S. MacKay, and Ignacio and Santiago Grijalva and Gerardo Ortiz, which are ordered received and filed in evidence, and read into the record.

Whereupon to maintain further upon his part the issues herein plaintiff offers certain documentary evidence, which is received in evidence and read into the record, the witness P. Sandoval being questioned thereon. (Exhibits A, B, C.)

Wherupon to maintain further upon his part the issues herein plaintiff calls as a witness- Epes Randolph and Brocey Curtis, who are sworn duly, examined and cross-examined.

Whereupon plaintiff rests. And thereupon it is by the court ordered that further trial of this cause be and the same is now continued until 2 o'clock p. m. of this day.

20 [Title of Cause.]

Further trial of this cause having been continued from this morning's session of this court, come now the respective parties herein, by and with their respective counsel, into open court, and further trial of this cause proceeds as follows, to wit:

Plaintiff moves that leave be granted to reopen his case, to intro-

duce further testimony, which said motion is by the court ordered granted.

Whereupon to maintain further upon his part the issues herein plaintiff recalls the witness Epes Randolph, for further examination, and said witness was examined further, and cross-examined.

Whereupon plaintiff again rests his case.

Thereupon defendant moves dismissal of the Complaint herein, setting up the Statute of Limitations as a ground for the motion; which said motion is by the court ordered overruled and denied.

Whereupon defendants move for leave to amend their Answer, which said motion is by the court ordered overruled and denied. Thereupon defendants move that an exception be noted to said ruling, and entered in the record, and it is so ordered.

Whereupon defendants present again their motion for a continuance until Thursday, April 11th, 1907, which said motion is by the court ordered overruled and denied.

Whereupon, to maintain upon their part the issues herein, defendants call as a witness P. Sandoval, sworn hereinbefore, who was examined and cross-examined.

Whereupon to maintain further upon their part the issues herein, defendants offer in evidence a copy, written in the Spanish language, of a certain contract, to the admission of which plaintiff objected, and his said objection is ordered overruled, and said documentary evidence is filed as Exhibit 1. An exception ordered noted in the record.

Whereupon to maintain further upon their part the issues herein defendants offer in evidence a certain deed, written in the Spanish language, which said deed is ordered admitted in evidence and filed as Exhibit 2.

Whereupon it is stipulated in open court, both parties consenting, that to complete the record certified translations of all documentary evidence in the Spanish language may be filed herein.

Whereupon to maintain further upon their part the issues herein defendants call as a witness Ricardo Gayou, who is sworn duly, examined and cross-examined.

Whereupon defendants renew their motion for continuance until Thursday, April 11th, 1907, which said motion is by the court ordered granted. But before continuing said case, as per order the court called to the stand the witness P. Sandoval, and questioned said witness from the bench. Whereupon said case is continued.

Minute Entries, April 11, 1907.

[Title of Cause.]

Further trial of this cause having been postponed from yesterday's session of this court, come now the respective parties herein with their respective counsel, into open court, and further trial herein is had as follows, to wit:

Defendants to maintain further upon their part the issues herein,

call as a witness A. Sandoval, who being duly sworn is examined and cross-examined. (Cross-examination by the court.)

Whereupon defendant- rests.

And there being no further testimony offered by either the plaintiff or the defendant-, and the testimony being now closed, the case is submitted without argument; and the court being fully advised herein, does now find for the plaintiff and against the defendants, and it is by the court ordered that judgment be entered herein in favor of the plaintiff and against the defendants, in the amount of Ten thousand dollars ($10,000.00) lawful money of the United States, with legal interest from May 12th, 1906, and for costs.

23 [Tit of Cause.]

Come now the defendants herein, by their counsel Eb. Williams and Antonio Orfila, Esq., into open court, and filed a motion for a new trial herein. Whereupon said motion is by the court ordered overruled and denied.

Whereupon said defendants by their counsel in open court, give notice of an appeal to the Supreme Court of the Territory of Arizona, and ask that the same be entered upon the minutes.

Whereupon, upon motion of defendants, by their counsel, in open court, it is hereby ordered, plaintiff consenting thereto, that a stay of execution for sixty days be entered herein.

TERRITORY OF ARIZONA,
County of Santa Cruz, ss:

I, Allen T. Bird, clerk of the District Court of the Second Judicial District of the Territory of Arizona, in and for the county of Santa Cruz, do hereby certify that the foregoing typewritten pages 1 to 8 contain a true and correct copy of the minute entries made in cause No. 482 Epes Randolph, plaintiff, vs. A. Sandoval and P. Sandoval, defendants, from April 1, 1907, to April 11th, 1907, and a whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 22nd day of April, A. D. 1907.

[SEAL.] ALLEN T. BIRD,
Clerk of said Court.

24 [Title of Cause.]

Deposition of H. S. MacKay.

Interrogatory 1.

Q. Please state your full name, your residence and occupation.

A. Henry Squairebrigs MacKay; my residence is San Francisco; my occupation, architect.

Interrogatory 2.

Q. Do you know A. Sandoval?

A. Yes.

Interrogatory 3.

Q. Do you know P. Sandoval?
A. Yes.

Interrogatory 4.

Q. Do you know Sandoval & Co.?
A. Yes.

Interrogatory 5.

Q. If you know either or all of the persons named in interrogatories 2, 3 and 4, state how long you have known them, where they reside, in what business they are engaged, and their respective places of business?

A. I have known P. Sandoval and A. Sandoval about three years. Their place of business is at Nogales, Sonora, Mexico. A. Sandoval has an office at Los Angeles. I do not know whether the Los Angeles office is the office of P. Sandoval & Company or not. They are bankers.

Interrogatory 6.

Q. Do you know Lycurgus Lindsay, and if so, how long
25 have you known him, and where does he reside?

A. Yes, I have known Mr. Lycurgus Lindsay about four years. He resides in Los Angeles.

Interrogatory 7.

Q. Do you know Epes Randolph, and if so, how long have you known him, and where does he reside?

A. Yes, I know Mr. Epes Randolph. I have known him about two years. He resides in Tucson, Arizona.

Interrogatory 8.

Q. Did you have any business transactions with A. Sandoval or P. Sandoval or the firm of Sandoval & Co. with respect to certain concessions in the State of Sonora, Republic of Mexico, generally known as the Sandoval Concessions?

A. Yes.

Interrogatory 9.

Q. Do you know the San Francisco mine in the Altar Mining District, State of Sonora, Republic of Mexico?

A. Yes.

Interrogatory 10.

Q. Did you have any conversations with A. Sandoval or P. Sandoval *on* or about the month of March, 1905, with respect to the Sandoval concessions or the San Francisco mine in the said
26 mining district in the State of Sonora? If so, state where such conversations were had, who was present thereat and all that was said at such conversations either by or to A. Sandoval or by any person within hearing of him.

A. Yes, I had a conversation with A. Sandoval in or about the month of March, 1905, with respect to the Sandoval concessions and the San Francisco mine of said mining district, in the State of Sonora. This conversation was held in Mr. Licurgus Lindsay's office in the Pacific Electric Building, Los Angeles. There was present Mr. Lycurgus Lindsay, Mr. A. Sandoval and myself. Negotiations relative to the purchase of the San Francisco mine began about the 24th day of March, 1905, in Los Angeles, California, between Mr. Lycurgus Lindsay and myself on the one part and A. Sandoval on the other. This transaction was closed with Sandoval & Company, represented by Mr. A. Sandoval for the concession in the State of Sonora, Altar District. During the progress of these negotiations, or on the day before mentioned, it was suggested to Mr. A. Sandoval by myself and Mr. Lindsay that we contemplate- the purchase of the San Francisco mine. Mr. A. Sandoval then stated that he could acquire this mine for us on better terms than we could purchase it from the owners. Mr. Sandoval stated that there were several
27 matters to be adjusted with reference to the Sandoval concession and he said he would adjust all these for us and would also purchase, on behalf of myself and Mr. Lindsay, and the company we were contemplating organizing, the San Francisco Mine. This agreement on his part was understood to be a part of the whole transaction covering the purchase of the Sandoval concession, and that Mr. Sandoval would use his influence and the influence of P. Sandoval & Company to acquire for Mr. Lindsay and myself (and the company we were contemplating organizing) the San Francisco mine.

Interrogatory 11.

Q. State all that was said at such conversation by or to P. Sandoval or by any person in the presence and within the hearing of P. Sandoval.

A. I had a conversation with P. Sandoval in Nogales, Mexico, between March 24th and April 22nd, 1905, with reference to the purchase of the San Francisco mine. I told P. Sandoval that I wished to purchase the San Francisco Mine in behalf of myself and Mr. Lycurgus Lindsay and Mr. Epes Randolph and asked Mr. Sandoval, as he was then acting as our agent in Mexico, as to the best means to obtain the mine on the best conditions. Mr. Sandoval said that he knew the owners of the mine and that they owed him some
28 money and that he was in a better position than any one else to open these negotiations and procure the mine for us at the best possible terms. I told Mr. Sandoval to open negotiations for the mine. I think there was no one present at this conversation but P. Sandoval and myself.

Interrogatory 12.

Q. Did you in or about the month of March or April, 1905, have any conversation with P. Sandoval with reference to the purchase of the said San Francisco mine? If so, state where the said conversation was had, who was present and all that was said at said conversation?

A. I had a conversation with Mr. P. Sandoval on or about the 24th day of April on my way to Mexico. I received a telephone message from P. Sandoval while I was at Tucson, Arizona. I do not remember the exact language used over the telephone, but in substance Mr. Sandoval stated that he had seen the owners of the San Francisco mine and could purchase it for the sum of $20,000 gold payable half cash and half on time. I told him that I would telephone later regarding the matter.

Interrogatory 13.

Q. Did you in or about the month of April, 1905, have any conversation other than that to which you have testified with P. Sandoval by telephone or otherwise? If so, state where you were,
29 where such conversation was had and what was said by you and what was said by him at such conversation?

A. I had a conversation with Mr. P. Sandoval over the telephone from Tucson during the month of April, as stated in the last question. On the same day, after consulting with Mr. Epes Randolph, who instructed me to go ahead and close the deal with P. Sandoval & Company for the San Francisco mine on the best term- I could make, I telephoned to Mr. P. Sandoval, who was then at Nogales, and told him that we would take the property provided the cash payment were fixed at $3000 and the balance on time. Mr. Sandoval replied over the telephone that he would endeavor to arrange with the owners to meet my terms. Subsequently, on the same day, Mr. Sandoval telephoned me that the terms suggested by me over the telephone were satisfactory to the owners. I then stated to Mr. Sandoval that I would proceed at once to Noagles to close the transaction.

Interrogatory 14.

Q. If you testify that you had a conversation over the telephone with P. Sandoval while you were at Tucson, state after such conversation what you did with reference to the San Francisco mine?

A. After my conversation with Mr. Sandoval over the tele-
30 phone I proceeded to Nogales, Sonora, and there on the 25th day of April, I entered into a written agreement with P. Sandoval & Company or P. Sandoval, I am not positive which, for the purpose of purchasing the San Francisco mine. Before this agreement was executed I asked Mr. Sandoval if this was the best possible terms that the mine could be procured at. He said that this was the very best possible terms that I can make for you with the owners.

Interrogatory 15.

Q. Did you have any other conversation than that to which you have testified with P. Sandoval over the telephone or otherwise with respect to the San Francisco mine? If so, state how the said conversation was had, where you were at the time thereof, where the said P. Sandoval was at the time thereof, and all that was said by either him or yourself?

A. I had no other conversation with P. Sandoval & Company regarding San Francisco mine until I talked with P. Sandoval at El Tiro, Sonora, Mexico, where Mr. Sandoval went with me to see Mr. Santiago and Ignacio Grijalva, the owners of the San Francisco mine, in regard to obtaining their ratification of the transaction. I talked with Mr. P. Sandoval at El Tiro about the mine as he had some difficulty in obtaining the consent of the brothers Santiago and Ignacio Grijalva to the transaction. Mr. Sandoval stated
31 that it would be necessary for him to go to Altar with the Grijalva Brothers to have the matter adjusted there, which he did a day or two after our conversation.

Interrogatory 16.

Q. If you testify that you had conversation with P. Sandoval over the telephone at any time, state whether you are familiar with the voice of P. Sandoval and whether or not you are sure from the sound of his voice whether or not it was P. Sandoval with whom you were talking over the telephone?

A. When I had the conversation with P. Sandoval over the telephone I was at Tucson, Arizona, I am familiar with the voice of P. Sandoval and I am sure that the conversation I had was with P. Sandoval.

Interrogatory 17.

Q. Did you have any other conversation with the said P. Sandoval over the telephone or otherwise with respect to the said San Francisco mine? If so, state where you were and where the said Sandoval was, and what was said by you and what was said by him, and if such conversation was over the telephone state how you were so familiar with the voice of the said Sandoval as to be perfectly certain whether or not it was the said P. Sandoval with whom you were talking.

32 A. I had no other conversation over the telephone except as stated in question previously asked. I am familiar with the voice of P. Sandoval from my acquaintance with him and from the many conversations I had had with him previous to that time. I am perfectly certain that Mr. Sandoval was conversing with me over the telephone.

Interrogatory 18.

Q. If you testify that you had two or more conversations with the said P. Sandoval over the telephone in the month of April, 1905, state when such conversations were held with respect to each other, and how long after one conversation the other was held, as near as you can remember, and whether upon the same or on consecutive days?

A. The conversations I had over the telephone were all, I think, on the same day while I was at Tucson, not over an hour or two between the conversations.

Interrogatory 19.

Q. State whether or not you went to Nogales, Mexico, after such

conversations with said P. Sandoval over the telephone if you had such conversations with him?

A. Yes, I went to Nogales, Mexico, after having a conversation with P. Sandoval over the telephone.

33 Interrogatory 20.

Q. Did you on or about the 25th day of April, 1905, see P. Sandoval at Nogales, Mexico, and if so, state the purpose with which you went to see him?

A. I saw Mr. Sandoval on or about the 25th day of April, 1905, at Nogales, Mexico, for the purpose of closing the negotiations to purchase the San Francisco mine.

Interrogatory 21.

Q. If you saw P. Sandoval at Nogales, Mexico, on or about the 25th of April, 1905, and had any conversation with him, state where such conversation was held, who was present, and all that was said at such conversation by either yourself or P. Sandoval in the presence of or within the hearing of P. Sandoval?

A. Yes, I saw P. Sandoval at Nogales, Mexico, on or about the 25th day of April, 1905, and had a conversation with him regarding the San Francisco mine. I am of the opinion that there was no one present but Mr. P. Sandoval and myself. I told Mr. Sandoval that I understood by my conversation with him over the telephone that $20,000 gold for the San Francisco mine was the price the owner wanted for the property. He stated that it was and that he telephoned me that the owners were satisfied to take $3,000 in

34 cash and the balance on time. I asked Mr. Sandoval if these were the best possible terms that could be made with the owners of the property and he stated they were. I do not remember the exact language, but in substance this is what I stated to Mr. Sandoval and what Mr. Sandoval stated to me. I then entered into an agreement with P. Sandoval or P. Sandoval & Company for the purchase of the San Francisco mine on these terms.

Interrogatory 22.

Q. Did you on or about the 25th day of April, 1905, execute in behalf of yourself or in behalf of yourself and any other persons *executed* any agreement with the said P. Sandoval or with the firm of A. Sandoval & Co.; and if so, in whose behalf — you executed said agreement?

A. Yes, I did execute on behalf of myself, Mr. Epes Randolph and Lycurgus Lindsay, an agreement to purchase the San Francisco mine of Mr. P. Sandoval or with the firm of P. Sandoval & Company. This agreement, I think, was signed by P. Sandoval & Company on the one part and myself on the other, but I was acting for myself and Mr. Randolph and Mr. Lindsay.

Interrogatory 23.

Q. If you executed any agreement at said time with the said P.

Sandoval or the firm of Sandoval & Co., have you the orig-
35 inal of said agreement, and if you have not the original, do you know where the original is? And if you do not know where the original agreement is, have you a copy thereof, and if you have a copy attach the same to this your deposition?

A. I have not the original agreement entered into with the firm of P. Sandoval & Company. I think Mr. Epes Randolph or Mr. Eugene S. Ives *have* the original agreement. I have no copy.

Interrogatory 24.

Q. If you have not the original or a copy of such agreement and do not know where the original is, state to the best of your recollection the substance of the said agreement, and by whom it was signed and in behalf of whom, and its date?

A. I think the original agreement is in the hands of Mr. Eugene S. Ives or Mr. Randolph at Tucson. I do not remember the exact wording of the agreement but I think it was signed by myself on behalf of Mr. Lycurgus Lindsay and Mr. Epes Randolph and myself on the one part and P. Sandoval & Co. or P. Sandoval on the other; dated about April 25th, 1905.

Interrogatory 25.

Q. Where did you go upon leaving Nogales after your arrival at Nogales on or about the 25th of April, 1905?

A. I went to El Tiro, Sonora, Mexico.

36 Interrogatory 26.

Q. Did you at any time go with P. Sandoval to El Tiro, Mexico? If so, state when you went there and the purpose of your going and what if any conversation you had with the said P. Sandoval before going there with respect to your purpose in going to El Tiro, Mexico.

A. I went to El Tiro, Mexico, with P. Sandoval, on or about the 26th day of April, 1905. I had a conversation with Mr. P. Sandoval before going there with respect to the San Francisco mine. Mr. Sandoval said that the property being owned by three brothers and his agreement only being signed by one of *this* brothers, it was necessary for him to go to El Tiro and see the other two brothers and get them to ratify the agreement signed by the one brother. I told Mr. Sandoval that it was very necessary for us to get the matter legally closed with the result that Mr. Sandoval went to El Tiro with me to attend to this matter.

Interrogatory 27.

Q. Do you know Ignacio Grijalva and Santiago Grijalva or either of them, and if so, how long have you known them?

A. Yes, I know Mr. Ignacio Grijalva and Santiago Grijalva. I have known them nearly two years.

37 Interrogatory 28.

Q. If you know them, where did you meet them and state whether P. Sandoval met them at said time?

A. I met them at El Tiro, Sonora, Mexico, with Mr. P. Sandoval.

Interrogatory 29.

Q. Were you present at any conversation between P. Sandoval and the said Sandoval and Ignacio and Santiago Grijalva or either of them at which the San Francisco mine was discussed? If so, state all that was said at such conversation?

A. I was not present at any conversation between P. Sandoval and Ignacio Grijalva and Santiago Grijalva because they always spoke in Spanish and as I was not familiar with the Spanish language I did not attend any of their meetings.

Interrogatory 29.

Q. If you were not present at any conversation between the said Sandoval and the said Ignacio and Santiago Grijalva do you know whether or not the said P. Sandoval had *on* or about said time any conversation with the said Grijalvas or either of them at which you were not present?

38 A. Yes, I know that Mr. P. Sandoval had several conversations with Mr. Ignacio Grijalva and Santiago Grijalva at the time Mr. Sandoval was at El Tiro with me.

Interrogatory 30.

Q. Did you at El Tiro, Mexico, have any conversation with P. Sandoval in which the said P. Sandoval told you that he had had any conversation with the said Grijalvas or either of them, and if so, state what Sandoval told you was said, by P. Sandoval or either of the Grijalvas at such conversation.

A. Yes, I had a conversation with Mr. P. Sandoval at El Tiro, Mexico, and Mr. P. Sandoval told me that he had several conversations with the Grijalvas and that he was not able to arrange the matter with them at El Tiro and that it would be necessary for him to meet them at Altar, where the records were and it was arranged between Mr. Sandoval and the Grijalvas to meet at Altar.

Interrogatory 31.

Q. Did you in the latter part of May, 1905, have any conversation with P. Sandoval with respect to the purchase price of the San Francisco mine, and if so, state where such conversation was had, who was present and all that was said thereat.

39 A. Yes, I did have a conversation with Mr. P. Sandoval the latter part of May, 1905, in respect to the purchase of the San Francisco mine at Nogales, Sonora, Mexico. I asked Mr. Sandoval about the fact that he had purchased the mine for $20,000 Mexican money and — represented to me that it was costing

$20,000 gold. I asked him why this representation was made to me. Mr. Sandoval stated that the former owners had owed him considerable money and that he had been to a great deal of trouble in the matter and that he had to get something for his services. I told Mr. Sandoval that he agreed to buy the mine for myself and associates on the best possible terms and that he stated to me at the time of the negotiation that $20,000 gold was the lowest price the mine could be purchased for and that now, I have found that he had purchased the mine for $20,000 Mexican. I asked him what he was going to do about this. Mr. Sandoval replied that he would make the matter all right. There was no one present at the conversation, as I remember, but Mr. Sandoval and myself. The conversation took place in Mr. Sandoval's private office at Nogales, Sonora, Mexico.

Interrogatory 32.

Q. Do you know whether on or about the 21st day of May, 1905, an agreement was entered into between P. Sandoval or the firm of Sandoval & Co., and the said Grijalvas or either of them?

40 A. Yes, I know that an agreement was entered into between P. Sandoval, or the firm of P. Sandoval & Co., and the said Grijalvas on or about the 25th day of May, 1905.

Interrogatory 33.

Q. If such an agreement was entered into, state where you first saw the said agreement, who showed it to you, and if P. Sandoval or A. Sandoval showed it to you, state all that was said between yourself and the said P. Sandoval or A. Sandoval at said time with reference thereto, or with reference to the San Francisco mine, or its purchase?

A. The first time I saw this agreement was after I had obtained a certified copy from the records of Altar.

Interrogatory 34.

Q. If there was an agreement dated on or about May 21st, 1905, between the said P. Sandoval or P. Sandoval & Co. and the said Grijalvas, or either of them, or with any other parties with respect of the purchase of the said San Francisco mine, have you the original agreement, and if not, do you know where the same is; and if you have the original agreement, please attach it to this deposition.

A. The agreement was dated about March 21, 1905, be-

41 tween P. Sandoval or P. Sandoval & Company and the said Grijalvas with respect to the purchase of the San Francisco mine. I have not the original agreement nor a copy thereof. I turned this agreement over to Mr. Eugene S. Ives at Tucson, Arizona.

Interrogatory 35.

Q. If you have not such original agreement, if you have a copy of it, please state how you know it to be a copy, and attach the same to this deposition.

A. I have not the original agreement nor a copy, but the copy which I had was a certified copy, certified to by the Notary at Altar.

Interrogatory 36.

Q. If you have not the original or a copy of such agreement say from your recollection as near as you can, the substance of the said agreement?

A. I do not remember in detail the substance of this agreement between P. Sandoval or P. Sandoval & Company and the Grijalvas other than it stated that the full price of the mine was $20,000 Mexican money.

Interrogatory 37.

Q. Please state all that you know with respect to the purchase of the San Francisco mine from P. Sandoval or A. Sandoval or the firm of Sandoval & Co. and the negotiations that led up to the
42 same, and the conversations that were had thereabout, and everything that was done in relation thereto and all that you know about the — of the said mine by P. Sandoval or A. Sandoval or the firm of Sandoval & Co., and anything that you know with respect to the subject matter of this cause of action.

A. I made an agreement with A. Sandoval, representing P. Sandoval & Company, for the purchase of the concession in Sonora, Mexico, on or about the 24th day of March, 1905, at Los Angeles. After examining this concession with Mr. Lycurgus Lindsay, my associate in the matter, we discovered that the San Francisco mine was favorably located and was at that time producing considerable gold, and as the ground included in the concession surrounded this San Francisco mine, we thought it advisable to purchase it, and after returning from the mine Mr. Epes Randolph became associated with Mr. Lindsay and myself in the general enterprise and we told Mr. Randolph how the San Francisco mine was located. I previously had had a conversation with Mr. A. Sandoval in Los Angeles regarding the purchase of the San Francisco mine and he assured us that the mine could be purchased at a reasonable price and that he or his firm was in a position to purchase the property at a better price than any one else as they were acquainted with the owners
43 and had some business transactions with them. These various conversations between Mr. Randolph, Mr. Lindsay and myself resulted in my being authorized to purchase the San Francisco mine at the best terms I could, as I was acting in the capacity of general manager of the enterprise in Mexico. I had appointed P. Sandoval & Company as our agents in Mexico and when I told Mr. P. Sandoval to enter into negotiations for the San Francisco mine I did so because he knew the owners of the property and as the transaction had to be carried through in the Spanish language and as I was not familiar with the language, and Mr. P. Sandoval & Company were familiar with the language, and they were our agents to transact business of this kind in Sonora, I left the matter entirely in their hands to negotiate with the owners of the property and to transact the business. The transaction was carried through as I

have stated in the foregoing questions and as is shown by the document signed by myself and P. Sandoval or P. Sandoval & Company and as signed by P. Sandoval, or P. Sandoval & Company and the Grijalvas.

P. Sandoval & Company were paid $20,000 in gold for the *the* property, $3,000 of which I paid them by a check at Nogales. This cancelled check is with the vouchers of the Llanos de Oro Mining and Milling Company, which I think are in the hands of
44 Mr. Epes Randolph at Tucson, Arizona. The balance of the $20,000 gold paid P. Sandoval & Company for this mine was, I think, paid by Mr. Epes Randolph and the cancelled check of this transaction should be with the vouchers of the Llanos de Oro Mining and Milling Company, which are, I think, in the possession of Mr. Epes Randolph at Tucson, Arizona.

(Signed) HENRY S. MacKAY.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, R. B. Treat, a Notary Public in and for the City and County of San Francisco, State of California, duly qualified as such, and also Commissioner by virtue of the authority hereto attached, hereby certify that in compliance with the commission hereto attached, I caused the within named Henry Squarebrigs MacKay, the witness herein described, to appear before me on the 29th day of March, 1907, and who, first being sworn by me to testify to the truth, the whole truth and nothing but the truth, thereafter testified as hereinbefore set forth, and his testimony was written down by my direction and afterwards read over by him, and after being corrected by him, as noted by me, he signed the same in my presence.
45 Witness my hand and official seal this 30th day of March, 1907.

[SEAL.] (Signed) R. B. TREAT,
Notary Public in and for the City and County of San Francisco, State of California, and Commissioner.

[Title of Cause.]

Deposition of Lycurgus Lindsay.

Deposition of Lycurgus Lindsay, a Witness Sworn and Examined under and by Virtue of a Commission Issued out of the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Santa Cruz, in a Certain Cause Therein Pending Between Epes Randolph, Plaintiff, and A. Sandoval and P. Sandoval, Defendants.

LYCURGUS LINDSAY, a witness produced on behalf of the plaintiff, being duly sworn to speak the truth, the whole truth, and nothing but the truth, deposes and says as follows:

Answers to Direct Interrogatories.

Interrogatory 1.

Q. Please state your name, residence and occupation?
46 A. Lycurgus Lindsay; residence, Los Angeles, California; tile manufacturer.

Interrogatory 2.

Q. Do you know the defendant A. Sandoval, and if so, how long have you known him?
A. I know him, yes. I have known him for the last twelve years.

Interrogatory 3.

Q. Do you know the defendant P. Sandoval, and if so, how long have you known him?
A. Yes, about the same length of time.

Interrogatory 4.

Q. Do you know the firm of Sandoval & Co.?
A. Yes.

Interrogatory 5.

Q. Do you know Henry S. MacKay and how long have you known him?
A. Yes, I know him, I think I have known him for about four years.

Interrogatory 6.

Q. Do you know the San Francisco mine in the Altar district in the state of Sonora, republic of Mexico?
A. Yes.

Interrogatory 7.

Q. Did you take part in or were you present at any of the
47 conversations with either of the above named defendants with respect to the purchase of the San Francisco mine or with respect to such mine?
A. Yes.

Interrogatory 8.

Q. If you answer "yes" to the last question, state where such conversations were had, to the best of your recollection when they were had and who was present, and state all that was said at such conversations by anyone in the presence and within the hearing of either of the defendants?

A. The first conversation was with A. Sandoval in the spring of 1905, in my office, 475 Pacific Electric Building, Los Angeles. Henry S. MacKay was also present; no one else was present. The conversation came up when we were talking over the concession of the Llanos de Oro. We were speaking of some claims that were either within the boundaries of the above mentioned concession or the properties adjoining them, and A. Sandoval, who represented Sandoval and Company, said he was willing to help in securing them. We spoke of the San Francisco mine in particular on account of it being worked at the time by the Grijalva Brothers, A. Sandoval stating that if he wanted that property, for us not to go to the Grijalva Brothers direct, as they would ask us two or three
48 times the value of the property. Mr. Sandoval stated that he knew the characteristics of the Mexicans, and could deal with them much better than we could. He stated that the Grijalvas generally brought in their gold and sold it to the Sandovals and they generally stayed there on a drunken and gambling spree until their money was all spent, and then borrowed a few hundred dollars of them, until the Grijalvas owed them a considerable sum. He said that they were not only interested in getting their own money out of the Grijalvas, but that they were interested in our taking up the concession from the Mexican government, and that they would lend their assistance in all these affairs without charge. Mr. Sandoval said that if we would leave the purchase of the mine from the Grijalva Brothers to him, that he could get it at practically his own price, if he made the negotiations at the time the Grijalvas came in after spending their money as above stated. The foregoing is the substance of the conversation as nearly as I can recollect.

Interrogatory 9.

Q. Do you know the plaintiff Epes Randolph, and how long have you known him?

A. Yes, I have known him five or six years.

Interrogatory 10.

Q. Was the San Francisco mine purchased by or on behalf
49 of Mr. Randolph, Mr. MacKay and yourself? If so, state, if you know, whether any money was paid by or on behalf of Randolph, and yourself or either of you, to the firm of Sandoval & Co. or to either of the defendants for the purchase of the San Francisco mine.

A. Yes, there was three thousand dollars paid by MacKay, for which payment, Mr. Randolph and I furnished the money, the

alance of the purchase price I placed in the First National Bank of os Angeles to the credit of the First National Bank of Nogales, ith instructions to Bracey Curtis, cashier of the First National Bank f Nogales, to go to the Bank of Sonora in Nogales and make the ayments, as the contract and deeds were put in escrow in the last amed bank according to the contracts and deeds put in escrow.

Interrogatory 11.

Q. If you answer "yes" to the last question state how much was aid, who paid it and to whom the money so paid belonged?

A. I don't know the exact amount, whether it was all paid at once, r at two separate times, but the money was furnished by Epes Randolph and myself personally, and the money that was paid belonged o Epes Randolph and myself.

Interrogatory 12.

Q. After the purchase of said mine, did you have any conversation with A. Sandoval with respect to the purchase price f said mine?

A. Yes.

Interrogatory 13.

Q. If you answer "yes" to the last question, state who was present t such conversation, when and where it was had and what was said hereat.

A. That was on September 29, 1906, in the Llanos de Oro office, n the Pacific Electric Building, Los Angeles, California; Mr. Epes Randolph and Aurelio Sandoval and myself were present. Mr. Randolph asked Mr. Sandoval about the mines in general; asked him who had salted the mines, etc.; to which Mr. Sandoval replied that he had seen great quantities of gold taken out, and had found great quantities of gold at all the stores in Tiro.

Mr. Randolph then asked Mr. Sandoval how much was paid for he San Francisco mine, to which Mr. Sandoval gave an evasive eply by saying that the Grijalvas Brothers generally brought in five r six hundred dollars in gold, and generally drew seven or eight undred dollars, or on that basis, and that they were indebted to hem for a great sum.

Mr. Randolph then said: "But that does not answer. You know hat you claimed to have paid $20,000 gold to the Grijalva Brothers, while in fact you only paid $20,000 in Mexican silver, and then that you made a false representation to us, and the money was paid with the understanding that you paid $20,000 in gold." This Mr. Sandoval admitted was the case, but aid the Grijalvas were owing them, and the fact was that they (Sandovals) were the owners of the mine at that time.

Mr. Randolph said he wished they might return the $20,000 Mexican that they had got by false representation, before taking out he stock in escrow at the Farmers' & Merchants' Bank, but told Mr. Sandoval that the stock was there in escrow as per agreement,

and that *was* always lived up to our agreements; and that he could have it for the asking, but that he thought it would show better faith if they (Sandovals) first returned the money that they had got wrongfully from us.

Interrogatory 14.

Q. Do you still own any interest in the claim against the defendants growing out of the purchase of the San Francisco mine?
A. No.
(Signed) L. LINDSAY.

52 Subscribed and sworn to before me, this 3d day of April, 1907.
[SEAL.] (Signed) ELIZA P. HOUGHTON,
Notary Public in and for the County of Los Angeles, State of California.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, Eliza P. Houghton, a Notary Public in and for the County of Los Angeles, State of California, do hereby certify that pursuant to the commission hereto attached, the witness, Lycurgus Lindsay, appeared before me, and, after being duly sworn, his evidence was taken down, and read over and corrected by him, after which he subscribed the same in my presence, on the 3d day of April, 1907, at my office, room 311 Los Angeles Trust Building, in the city of Los Angeles, county of Los Angeles, state of California, and that I have personal knowledge of the said witness.

In witness whereof, I have hereunto set my hand and official seal, the day and year last aforesaid.
[SEAL.] (Signed) ELIZA P. HOUGHTON,
Notary Public in and for the County of Los Angeles, State of California.

53 [Title of Cause.]

Depositions.

GERARDO ORTIZ, being first duly sworn, testified as follows:

Direct examination by Mr. IVES:

Q. What is your name and your residence?
A. Gerardo Ortiz; El Tiro, in the State of Sorona, Republic of Mexico.
Q. Do you know A. Sandoval?
A. Yes.
Q. Do you know P. Sandoval?
A. Yes, I also know him.
Q. How long have you known them?
A. About ten years.

Q. Do you know the San Francisco mine in the Altar Mining District, State of Sonora, Republic of Mexico?
A. We are proprietors of it.
Q. Who were the owners of it—of that mine, mention the names?
A. Myself, Gerardo Ortiz, and my half brother Santiago Grijalva and Ignacio Grijalva.
Q. Did you sell that mine to anybody in the year 1905?
A. Yes, sir.
Q. To whom did you sell it?
A. Prospero Sandoval.
Q. What did he pay you for it?
54 A. $20,000 Mexican money.
Q. How did he pay you that money?
A. He paid $10,000 down and $10,000 in six months.
Q. Did he pay that $20,000 Mexican money to you only or to you and your brothers the other owners of the mine?
A. To everybody—the three brothers.
Q. Was a part of the purchase price a debt which you owed Sandoval & Co.?

Objected to as immaterial.

A. We owed about $1300 to Prospero Sandoval and he paid $10,000 down by check through Sandoval's Bank in Sonora and the rest he paid six months afterwards.
Q. By the "rest" does he mean $10,000 more or does he mean $10,000 less than $1300?
A. He paid $20,000 in all and never took out anything for the bill, made no discount for the bill.
Q. Did he pay you $20,000 in addition to the $1300 you owed him?
A. He discounted the $1300 afterwards; the consideration was $20,000. I have some documents to show it.
Q. When he paid you the last $10,000 did he take from it the $1300 you owed him?
A. He deducted $1340 from the last payment for money that we owed Sandoval & Co.
55 Q. Did you owe Sandoval & Co. any other money besides that $1340?

Objected to as immaterial.

A. No, not to Prospero Sandoval.
Q. Did you owe Sandoval & Co. anything more?
A. No.
Q. Did you owe A. Sandoval any other money?
A. No, I did not owe either one of them anything else.
Q. How did you become indebted to Sandoval for this $1340?

Objected as immaterial.

A. Sandoval paid me this money so as to have an option on the mine, the San Francisco mine.
Q. And what was the purchase price for that option?

A. $20,000.
Q. Mexican money or gold?
A. Mexican money.
Q. Then if Sandoval was to take the mine he was to pay $20,000 less this $1340, was he?
A. Yes, sir.
Q. And if Sandoval did not take the mine, did he hold the mine or was this $1340 to be repaid him?
A. Yes—but they had the money ready to give us.

Cross-examination by Mr. WILLIAMS:

56 Q. What time in the year 1905 did you sell the mine to Sandoval?
A. The 21st day of May, 1905.
Q. Did you have a written contract with Sandoval for the sale of that mine?
A. Yes, sir.
Q. Do you remember exactly the date of that contract.
A. I do not remember, but the contract is in Nogales, Sonora.
Q. Was not the paper made in January, 1905?
A. I believe so, I am not certain.
Q. Did you have anything to do with anyone but Prospero Sandoval in the sale of that mine?
A. No.
Q. Was all the contract a deal made exclusively with Prospero Sandoval?
A. With Prospero Sandoval.

SANTIAGO GRIJALVA was thereupon called by the plaintiff, and was duly sworn, whereupon the counsel for the defendant- asked him if he had heard the testimony of the last witness, Gerardo Ortiz, and he answered under oath that he had heard the testimony and understood. Thereupon, at the instance of the counsel for the defendants, and with the approval of counsel for the plaintiff it was

57 Stipulated that the witness should be deemed to have given the same testimony as the witness Ortiz.

IGNACIO GRIJALVA being first duly sworn, testifies as follows:

Direct examination by Mr. IVES:

"Q. Do you know Prospero Sandoval?
A. Yes, sir.
Q. Do you know Aurelia Sandoval?
A. Yes, sir.
Q. Do you know the San Francisco mine in the Altar Mining District, Sonora, Mexico?
A. Yes, sir.
Q. Who were the owners of the San Francisco mine?
A. Gerardo Ortiz, Santiago Grijalva and myself, Ignacio Grijalva.
Q. You mean yourself by Ignacio Grijalva?
A. Yes.

Q. Did you sell the mine?
A. Yes.
Q. To whom did you sell it?
A. Prospero Sandoval.
Q. How much were you paid for it?
A. One third part of $20,000.
Q. Mexican money or gold?
A. Mexican.
Q. Was it all paid at the same time?
58 A. No, in two payments.
Q. Where was it paid?
A. In El Tiro.
Q. When was the last part paid?
A. Here in Nogales.

Cross-examination by Mr. WILLIAMS:

Q. When did you make the contract with Prospero Sandoval for the sale of the mine?
A. I am not certain when it was made.
—. ——.
A. I do not know the date but it is on the contract.
Q. Was it not in January, 1905?
A. I am not certain.
Q. Were you personally present at the making of the contract?
A. I was present in person and signed it.
Q. Where was the contract made?
A. It was made here in Nogales.
Q. Nogales, Arizona or Sonora?
A. Nogales, Sonora, and then at Altar.
Q. Was not your contract made entirely with Prospero Sandoval?
A. I made the contract with P. Sandoval.
Q. Was it not made exclusively with P. Sandoval?
A. Yes, he alone.
Q. You were the owner of a one-third interest in the mine?
A. Yes.
59 Q. And you received your one-third of the money—of the $20,000?
A. Yes.

[Title of Cause.]

Appearances: Mr. Eugene S. Ives, for plaintiff; Mr. Eb. Williams and Mr. A. Orfila, for defendants.

Trial at Nogales, Santa Cruz County, Arizona, April 10, 1907, before Honorable Frederick S. Nave, Judge, without a jury.

Mr. WILLIAMS: To eliminate a lot of evidence, it will not be necessary to prove what is proven. We will consider as proven that on the 23rd day of January, 1905, Prospero Sandoval obtained a concession of the San Francisco mine from Ortiz and Grijalva; that this contract was made with Ortiz and Grijalva, exclusively, in the

State of Sonora, in the Republic of Mexico, and that on the 25th day of April, 1905, he sold the same property to MacKay for twenty thousand dollars, gold, and that this sale and contract for sale was made in Sonora, Mexico, and that in that he dealt exclusively with MacKay, and that they received twenty thousand dollars gold and paid for it with twenty thousand dollars Mexican money; that they bought it for twenty thousand dollars Mexican money and
60 sold it for twenty thousand dollars gold; and that on the 29th day of the same April Mr. MacKay took both deeds, in an open envelope, and deposited them in the Bank of Sonora as escrow to be delivered upon payment of the money.

Mr. IVES: I am not stipulating but receiving his stipulation; but, under his stipulation I will not be called upon to prove that we paid twenty thousand dollars gold and that they paid twenty thousand dollars Mex. and on those dates.

Mr. WILLIAMS: That is right.

P. SANDOVAL, called for cross-examination, being first duly sworn, testified as follows:

Examination by Mr. IVES:

Q. Where do you reside, Mr. Sandoval?
A. Nogales, Sonora, Mexico.
Q. You are one of the defendants in this action?
A. Yes sir.
Q. The other defendant is your brother I believe?
A. Yes, sir, Aurelio Sandoval.
Q. And you and he are partners?
A. Yes, sir.
Q. And have been since 1904?
A. Yes, sir.

Q. And in this transaction with respect to the San Fran-
61 cisco mine your firm participated in the consideration price?
A. Yes, sir.

Q. Did you have anything to do, Mr. Sandoval, personally, with either the purchase or the sale of the San Francisco mine?
A. Yes, sir.
Q. What?
A. I did it all. I bought the property and sold it.
Q. From whom did you buy it?
A. From Gerardo Ortiz, Ignacio Grijalva, and Santiago Grijalva.
Q. Did you have any conversation with Mr. MacKay with reference to the acquisition of this property?
A. Yes, sir.
Q. When?
A. About the month of April, 1905.
Q. Where?
A. At my office in Nogales, Sonora.
Q. What was stated?
A. He told me he wanted to get the San Francisco mine. He wanted to get it and I told him I would sell it to him and we talked

about the price. I first asked twenty five thousand dollars, gold, in two payments: one, ten thousand dollars, and one, fifteen thousand dollars; and he said it was too high and I finally cut it down
62 to ten thousand in cash and ten thousand in six months and he thought that too high and he told me he would go and see the property and examine it and on his return decide whether he would take it or not.

Q. Did you have any other conversation with Mr. MacKay with respect to it?

A. Yes sir, we had several.

Q. Did you make a trip to El Tiro?

A. Yes sir.

Q. With respect to the purchase of the property?

A. Yes sir.

Q. That was after your conversation with Mr. MacKay?

A. Yes sir.

Q. And the purpose was to acquire this property?

A. No, we had acquired the property already.

Q. Had you a deed at that time?

A. Had an option.

Q. But the purpose of your trip to El Tiro was in connection with the San Francisco mine?

A. That was one of the objects; not entirely that.

Q. You will pardon me, I didn't catch whether you are A. or P. Sandoval?

A. I am P. Sandoval.

Q. Will you kindly look at these documents and state to
63 me whether they eminated from your firm?

A. They are from our firm.

Mr. IVES: Mark them for identification.

A. The first one is from our firm and the others are all vouchers.

Q. Yes, but they all came from your firm?

A. Yes sir.

Q. Without reading this document I would like to ask you in whose handwriting it is?

A. It is mine.

Q. And the signature is yours?

A. Yes sir.

Mr. IVES: Mark that for identification.

Mr. IVES: That is all, Mr. Sandoval.

Mr. IVES: Now, may it please Your Honor, I will read the deposition of Mr. MacKay.

Mr. IVES: The situation upon the record, may it please Your Honor, is that the questions in the deposition have been read and the answers read in evidence.

The COURT: Yes.

Mr. IVES: Now I also ask the questions in this deposition of Mr. Lycurgus Lindsay.

The COURT: Any objection to the deposition of Mr. Lindsay?

Mr. WILLIAMS: None were made at the time.

The COURT: Let the record show that it was read in evidence.

64 Mr. IVES: I would now put in the other three depositions of the other three Mexican witnesses.

The COURT: Any objection to the consideration of the testimony of Gerardo Ortiz?

Mr. ORFILA: No objection to any of them.

The COURT: It will be taken into consideration, therefor.

The COURT: Any objection to the deposition of Santiago Grijalva?

Mr. ORFILA: None.

The COURT: It will be received in evidence.

The COURT: Any objection to the deposition of Ygnacio Grijalva?

Mr. ORFILA: None.

The COURT: It will be received in evidence.

Mr. IVES: Now I offer in evidence, may it please your honor, the two papers that I offered for identification; that one first.

The COURT: Any objection.

Mr. ORFILA: The objection is that they are immaterial. I do not care to press the objection but they are immaterial unless connected with this case at issue.

The COURT: It may be received in evidence and marked plaintiff's exhibit A.

Mr. IVES: Now I offer in evidence document marked plaintiff's B for identification.

The COURT: Is there any objection?

Mr. ORFILA: We don't object.

65 The COURT: It may be marked plaintiff's exhibit B.

Mr. IVES: I neglected to identify this letter. I offer in evidence another letter purporting to be signed by Mr. Sandoval.

Mr. ORFILA: No objection.

The COURT: Plaintiff's exhibit C.

EPES RANDOLPH, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Examination.

By Mr. IVES:

Q. You are the plaintiff in this action?

A. I am.

Q. Do you know Mr. Henry S. MacKay?

A. I do.

Q. Do you know Mr. Lycurgus Lindsay?

A. I do.

Q. Do you know the San Francisco mine in the Altar district in the state of Sonora?

A. I do.

Q. Were you interested in the purchase of that mine?

A. I was.

Q. How much was paid for it by yourself and associates?

A. Twenty thousand dollars, gold.

Q. Whose money was paid for it?
66 A. Mine and Lindsay's.
Q. Have you had any conversation or understanding with Mr. Lindsay, prior to the commencement of this action and subsequent to the payment of the money, with respect to acquiring his interest in the claim against Sandoval & Co.—subject of this action?

Mr. ORFILA: Objected to as being incompetent.
The COURT: Objection overruled.
Mr. ORFILA: Exception.

A. Lindsay transferred his interest to me.
Q. For a consideration?
A. Yes sir.
Q. For what consideration?
A. One half of the recovery less the cost of the suit.
Q. Do you know Mr. A. Sandoval?
A. I do.
Q. And Mr. P. Sandoval?
A. I do.
Q. The defendants in this action I mean?
A. Yes, I know them both.
Q. Did you have any conversation with either of them with respect to the San Francisco mine at any time?
A. Well, I had a conversation with A. Sandoval rather recently, probably six months ago.
Q. Where was it?
A. In Los Angeles.
67 Q. In what place?
A. My office, Pacific Electric Building.
Q. Who was there?
A. Myself, Lycurgus Lindsay, and Sandoval.
Q. Can you fix, approximately, the date of the conversation?
A. No, I think it was in September, about September 15th, sometime last September.
Q. Can you state definitely whether the conversation was prior or subsequent to the purchase of the San Francisco mine?
A. It was long subsequent.
Q. Please state what occurred and what was said.
A. I don't recollect exactly what occurred; I told Sandoval I thought I had ascertained that he bought the mine for twenty thousand dollars Mex. and sold it to us for twenty thousand dollars gold, or that we had paid him twenty thousand dollars gold, and asked him if that were true and he didn't answer at first or evaded the question and I finally told him I knew it was true and he said his brother handled the transaction and I asked him not to remove certain stock until they paid that money and he finally admitted it and he said that the people who owned the mine owed them about that amount. That was the substance of the conversation, I don't know the words.
Q. When did you first ascertain that either of the defend-
68 ants had paid only twenty thousand dollars Mexican currency for the mine?

A. I don't know; but, it was sometime after we had paid the money, though.

Q. How did you obtain the information first?

A. I think MacKay gave me the first information.

Q. Did you have anything to do with the negotiations leading to its purchase?

A. We, personally?

Q. Yes?

A. I did not.

Q. Did you have any dealings with MacKay with respect to his negotiating for its purchase?

A. Before he purchased it, yes sir.

Q. When was that?

A. I don't know; that was a year and a half ago, I guess. It was the time it was purchased.

Q. State what instructions you gave MacKay with respect to the purchase of the mine?

A. To buy it as cheap as he could.

The COURT: Was Mr. MacKay in your employ?

A. He was not in my personal employ, judge. He drew a salary from the company, the mining company, and after the debts were all paid MacKay was to receive an equal amount of the stock of the company to myself.

The COURT: With reference to the purchase of the San
69 Francisco mine what relation did he sustain to you and Lindsay?

A. The San Francisco was to be put in the Llanos de Oro and Lindsay and myself were to furnish the money and after the debts were paid MacKay was to get one third of what was left.

Mr. IVES: That is all.

Examination.

By Mr. WILLIAMS:

Q. In the purchase of that mine had he full power to act for you?

A. He had.

Q. And the understanding was that he—whatever contract he made with respect to purchasing that mine you would make good?

A. That is right.

Q. That any act he did was your act?

A. Yes sir.

Q. Mr. MacKay, when did it first come to your knowledge—Mr. Randolph, when did it first come to your knowledge that Sandoval had purchased the mine for twenty thousand dollars Mexican money?

A. I have answered that, I don't remember. It was long after we paid the gold—it was after the final payment.

Q. You don't remember the date?

A. No sir.

70 Q. You never, personally, had any talks with Mr. Sandoval here in relation to the purchase of the mine?

A. I did not.
Q. P. Sandoval?
A. I did not.
Q. Then all that you know of the transaction that occurred in Mexico, except the fact that you paid your agent the money, then, you say comes to you from what others have told you?
A. That is a fact.

Mr. WILLIAMS: That is all.

Mr. IVES: When you say you have no personal knowledge do you include in your testimony the conversation of about the middle of September?
A. I had that personally.
Mr. WILLIAMS: Apart from that?
A. No sir.

BRACEY CURTIS, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Examination.

By Mr. IVES:

Q. Your business, please, Mr. Curtis?
A. Banker.
Q. Do you know the value of Mexican money with respect
71 to American money in the months of April, May, and June of 1905?
A. It is pretty hard to state that, the value changes. It would be pretty hard.
The COURT: He asked if you know, or not?
A. I do.
Q. Can you state to the court the amount of Mexican money in American money in the months of April, May, and June, 1905?
A. It goes by market price and the value don't really hold right through; it would be different on different dates. April, 1906, can you give me any special date?
Q. Say, the first of April, 1905?
A. It was about; it makes a difference. Our selling price, you want?
Q. Yes; what would it have sold for that day, yes.
A. That would make a difference, whether it was a large sum or small sum.
Q. Say twenty thousand dollars Mexican money, how much was that worth?
A. On that day it would have sold for forty nine seventy five.
Q. On the first of April?
A. Yes, 1905.
Q. Now, the first of May, 1905; what would it have sold at?
A. Forty nine seventy five.

72 Mr. ORFILA: Three thousand was paid on the 29th of April, 1905; five thousand the 24th of October, 1905; and twelve thousand the 24th of April, 1906.

Mr. IVES: Will it be generally admitted that the price of Mexican money was fifty cents on the dollar during all this time?

Mr. ORFILA: Yes.

Mr. IVES: That is all Mr. Curtis.

EPES RANDOLPH, recalled as a witness on behalf of plaintiff, having been previously sworn, testified as follows:

Mr. IVES: Have either of the defendants or any one else paid to either yourself or Mr. Lindsay or Mr. MacKay any amount on account of this claim, the subject of this action?

A. They have not to me nor to the others to my knowledge.

Mr. IVES: We rest.

The COURT: The further hearing of this case will be postponed until 2:00 p. m., April 10, 1907.

Mr. IVES: I would like to recall Mr. Randolph for one or two more questions.

The COURT: The case may be reopened.

EPES RANDOLPH, recalled as a witness on behalf of plaintiff, having been previously sworn, testified as follows:

73 Examination.

By Mr. IVES:

Q. Mr. Randolph, you were questioned as to when you ascertained that Sandoval & Co. had only paid twenty thousand dollars Mexican money for this property, I don't recall your precise answer?

A. I answered that I ascertained it, I don't remember the date, but it was after we paid the twenty thousand dollars gold.

Q. I want to call your attention to some testimony which was made by stipulation; that the final payment was made by you and your associates in May, 1906, it was received by them in April, 1906, or May, 1906.

The COURT: The 24th of April.

Q. Now, with that testimony refreshing your memory I would like you to answer whether or not, with reference to this last payment, you heard that they only paid twenty thousand dollars Mexican money before or after that time?

A. I don't know now, I don't remember when that payment was made but I got the information after the last payment.

Q. After the last twelve thousand dollar payment?

A. Yes sir, after it was all paid.

74 Mr. WILLIAMS: But you can't fix the date that you became possessed of that knowledge?

A. I cannot sir.

That is all.

Mr. IVES: Plaintiff rests.

Defense.

Mr. WILLIAMS: If the court please, I move that this action be dismissed at the cost of plaintiff on the ground that the action, by the evidence, is barred by the statute of limitations. I hold this to be absolutely essential in the complaint to save that proposition. As any attorney would do, he alleges that the plaintiff in this action became aware of the fact in January '96 and the action was brought in November '96. The statutes of 1903 provide expressly that an action based upon a fraud, and this is not an action to recover money upon a contract but the allegations of the complaint, as you will read them through, sets it up as a fraud practiced upon the plaintiff, that such an action must be brought within one year after the time—after the discovery of the fraud has been ascertained.

The COURT: The motion is denied.

Mr. ORFILA: That being the view of the court we would ask leave of the court to amend our answer by setting that up.

The COURT: Do you consent?

75 Mr. IVES: I absolutely resist.

The COURT: Motion denied.

Mr. ORFILA: We will make that offer more specific: The defendant-, at the conclusion of plaintiff's presentation of the case, it being disclosed by the evidence presented by plaintiff and not by the pleadings, contends that the remedy sought is barred by the statute of limitations—by Act of Nov. 16 of the legislative assembly of the territory of Arizona, 1903. The defendants now ask the court for leave to amend their answer by adding to and pleading the statute of limitations under Act No. 16 of the legislative assembly of the territory of Arizona, 1903.

Mr. IVES: The application is resisted.

The COURT: The application is denied.

Mr. ORFILA: With an exception for the defendants.

P. SANDOVAL, called as a witness on behalf of defendants, having been previously sworn, testified as follows:

Examination.

By Mr. ORFILA:

—. Mr. Sandoval, your name is P. Sandoval and you reside at Nogales, Sonora, Mexico?

A. Yes sir.

Q. Your occupation is banker and broker?

A. Yes sir.

76 Q. You know Mr. Randolph?

A. Yes sir.

Q. Mr. Lindsay and Mr. MacKay.
A. Yes sir.
Q. You are one of the firm of P. Sandoval y Cia.?
A. Yes sir.
Q. Mr. Sandoval, do you know the San Francisco mine in the Altar district?
A. Yes sir.
Q. Did you know that mine in January, 1905?
A. Yes sir.
Q. And do you know the present owners?
A. I didn't know the mine at that time but I knew the owners.
Q. Who were the owners?
—. Gerardo Ortiz, Ygnacio Grijalva and Santiago Grijalva.
Q. When did you become acquainted with Mr. MacKay?
A. In March, 1905.
Q. Was that the first time that you ever met Mr. MacKay?
A. That was the first time, about the latter part of March.
Q. Where did you meet him at that time?
A. In my office in Nogales, Sonora.

77 Q. Before this time had you had any dealings with the Grijalvas and Ortiz with reference to the San Francisco mine?

A. Yes sir.
Q. In what month of the year did you have any dealings with them?
A. In January, 1905.
Q. What was the nature of that dealing, if you had any?

Mr. IVES: Object, it is immaterial.
Mr. ORFILA: We expect to show that long before Mr. Sandoval became acquainted with Mr. MacKay, he had an option on it in his own name and for his own benefit and he bought the property and sold it to them.
The COURT: Do you expect to show that MacKay knew that; that Mr. Sandoval had the option before March?
Mr. ORFILA: I will avow that before May; no, I will avow before April that Mr. MacKay knew that these people had the option.
The COURT: I will let it go in and determine its materiality later on. Objection overruled.
Mr. IVES: Exception.

A. I bought the property from them; it was bought, an outright sale.
Q. Did you pay them any money at the time that option was taken?

Mr. IVES: That is immaterial.
78 The COURT: Objection overruled.

A. I paid them ten hundred and sixty dollars Mexican currency.
Q. Have you, in your possession, the agreement or the option or the papers that were made out between you and Mr. Grijalva and Gerardo Oritz at that time?

A. I have.
Q. Will you kindly produce them?
A. I will.

Mr. ORFILA: We offer this in evidence.
Mr. IVES: I object to it on the ground that it is immaterial and can't bind the plaintiff, and also that it is a copy and on all grounds. It is not the best evidence.

A. It is one of the originals, it is stamped and signed by them.
Q. You signed in duplicate, did you?
A. Yes sir, it was signed in duplicate.
Mr. IVES: Mr. Sandoval, the original contract is the one that is executed and left with the notary or judge?
A. Yes sir.

Mr. IVES: I object on the ground that it is a copy and not properly authenticated.
The COURT: Objection overruled.

Q. When you made that contract and paid this ten hundred and sixty dollars, Mexican currency, to the Grijalvas and Ortiz
79 had you any dealings with reference to the sale of that mine, the San Francisco mine, to Mr. MacKay, Mr. Lindsay, or Mr. Randolph?
A. No I did not.
Q. When did you first meet any one of these three gentlemen to talk about the San Francisco mine and with whom did you talk about selling the San Francisco mine?
A. Mr. MacKay, Mr. Henry S. MacKay.
Q. Where did you first see him?
A. At my office.
Q. By appointment?
A. Yes, he called there.
Q. Did you have any conversation with him with reference to that over the telephone from here to Tucson?
A. That was later; but, first he told me in the office. He told me that he wanted the mine and I told him I could let him have it if we agreed.
Q. Did he go to see the mine?
A. Yes.
Q. Did you go with him?
A. No.
Q. How long after did he return from the mine?
A. I couldn't say exactly but I think about a week.
Q. Did you speak to him again about the mine?
80 A. He spoke to me from Tucson by telephone.
Q. What did he say to you in that conversation?
A. He said he would accept the terms with the exception of paying the ten thousand dollars cash and ten thousand in six months. He offered to pay three thousand cash, five thousand in six months, and twelve thousand in another six months.
Q. Gold or Mexican money?

A. Gold, which proposition I accepted.
Q. How much did you offer it for at first?
A. Twenty five thousand.
Q. And you afterwards told him you would accept——
A. Twenty thousand.
Q. Did he come in response to that conversation?
A. He came the next day.
Q. Did you meet him in Nagoles, Sonora?
A. He came to my office and we had the papers drawn up.
Q. What time was this?
A. The 29th of April, 1905.
Q. And you drew up the papers and contract?
A. Yes sir, to the effect that the purchase price be twenty thousand dollars gold and the papers were deposited by him in the Sonora Bank.

81 Q. What other papers did he deposit in the Sonora Bank?
A. The deed of Oritz and Grijalva to us and the deed from us to him, two, two deeds.
Q. What was the consideration cited in the deed from Grijalva and Ortiz to you?

Mr. IVES: It is immaterial.
The COURT: It may be answered.
Mr. IVES: And on the ground that it is not the best evidence, he should produce the deed.
The COURT: That objection is well taken. In the absence of a showing the objection, on the latter ground alone, will be sustained.

Q. Did Mr. MacKay know at that time, Mr. Sandoval, when the deeds were taken by him to the bank, how much you were paying for the property?

Mr. IVES: Incompetent.
The COURT: He may state if he knows.

Q. Did Mr. MacKay know that you were paying twenty thousand dollars Mexican money for the mine?
A. I think he knew it. I had the two deeds—the one from Ortiz to us and the one from us to him.
Q. Was it in Spanish or English?
A. Spanish.
Q. Could he read Spanish?
A. He reads Spanish very well.

82 Q. Were they translated to him into English?
A. I think they were.
Q. Do you know whether or not Mr. MacKay within a short time after the 29th day of April, caused copies of those deeds to be made in English? Translations to be made into English?

Mr. IVES: It is immaterial.
The COURT: Objection sustained.
Mr. ORFILA: Exception.

Q. When were the deeds made, Mr. Sandoval; what is the date of them?

A. The deed from Grijalva to us was the 21st of April, 1905.

Q. And the deed from you to Mr. MacKay?

A. On the 25th of the same month.

Q. Did you and Mr. MacKay go to Altar or El Tiro and meet Mr. Grijalva and Mr. Ortiz before the execution of the deed from you to Mr. MacKay?

A. I think we went afterwards, after the execution.

Q. After the execution of the deed?

A. I think so.

Q. Did you go, Mr. Sandoval, with Mr. MacKay before the 29th day of April; do you remember whether you went before that or not?

A. Yes, it was before the 29th.

83 Q. Did you see Mr. Ygnacio and Santiago Grejalva with Mr. MacKay at that time?

A. Yes sir.

Q. Did you talk with Mr. MacKay, or with the Grijalvas or Ortiz in the presence of Mr. MacKay, as to what the purchase price was between you and the Grijalvas?

A. There was no talk in the presence of or before all of them, as to price.

Q. Did Mr. MacKay know—did you tell Mr. Mackay how much you were paying for that property?

A. I did not tell him.

Q. Do you know whether or not Mr. MacKay, before you met him, in March you say, had attempted to deal or buy the mine direct from the Grijalvas or Ortiz?

A. I don't know about that.

Q. You don't know, of your own knowledge?

A. No sir.

Q. Did you, at any time Mr. Sandoval, agree to buy this mine for these people, MacKay or the persons whom he represented, Mr. Randolph or Mr. Lindsay?

Mr. IVES: I object for the reason that it calls for a conclusion; let him state what occurred and what was said.

The COURT: That is well taken. Objection overruled.

84 A. I didn't agree to buy it for them.

Q. Did you have any information or any notice from your brother, Aurelio, from Los Angeles or elsewhere, that he had made any agreement with MacKay, Randolph, or Lindsay to purchase this mine for them?

Mr. IVES: It is immaterial and incompetent.

The COURT: Objection overruled.

A. I didn't receive any.

Q. Mr. Sandoval, your attention was called here this morning to a statement marked here plaintiff's exhibit A. You stated that was a correct statement?

A. Yes sir.

Q. On April 29th, the item there of notary fees, stamps and expenses for recording deed transferring the San Francisco mine, $195.50; and on May 3rd, $377.20, is that correct?

A. Yes sir.

Q. Explain what those items represent and what they are for and why you made the charges?

A. We made the charges because the price was twenty thousand dollars gold clear of all expenses.

Q. And that was the consideration for which you reduced your claim from twenty five thousand dollars?

A. That is part of it.

85 Q. The item of $64.50, May 3rd; what does that represent?

A. That was travelling expenses of Mr. MacKay who told me to charge it because I didn't go on the San Francisco matter alone.

Q. Were you interested with the Llanos de Oro Company at that particular time?

A. Yes sir.

Q. And you had an agreement with Mr. MacKay, he spoke of certain concessions; what concessions were they?

A. Concessions we had of placer ground.

Q. Was that in writing or oral?

A. In writing.

Q. Did you, at any time, Mr. Sandoval, enter into a contract with these people as to who should act as agent for them to purchase the San Francisco mine?

A. No sir.

Q. Calling witness' attention to plaintiff's exhibit B, the letter that you identified this morning written by you at Hermosillo, April 24th, 1905, to Gerardo Ortiz at El Tiro. A part of that letter refers to this transaction, what does that mean?

A. He said I request this kept to yourself, the matter of the sale of the San Francisco mine, in order not to disturb our projects.

Q. What did you mean by that?

86 A. We were trying to buy other mines there, that is our business to buy and sell them.

Q. What was your object then?

A. We didn't want to create any excitement about the prices.

Q. Did you have any other property or concessions in that neighborhood?

A. We did.

Q. What were the names?

A. The Elmeraldo and the Elisa.

Q. Did you, at any time, tell Mr. Grijalva or Mr. Ortiz to conceal the fact of what you were paying them or to conceal it from Mr. MacKay, Mr. Lindsay, or Mr. Randolph—the price you were paying for that mine?

A. No, I did not.

Q. Have you the deed or a certified copy of the deed between yourself and Mr. Grijalva—from the Grijalvas to yourself?

A. No, I have not.
Q. Where is that deed?
A. It is on record with the notary public.
Q. The deed then, as I understand it, Mr. Sandoval, was to you by these people?

Mr. IVES: I object to that, let him produce the deed.
The COURT: It would be repetition and upon that ground it is sustained.

87 Q. Have you a deed from yourself to Mr. MacKay?
A. Yes, I have a certified copy of it.
Q. Have you it with you?
A. Yes sir.

Mr. ORFILA: We offer this deed, the deed from Sandoval to MacKay, if the court please.
The COURT: Any objection.
Mr. IVES: No objection, Your Honor.
The COURT: Defendants' Exhibit 2.

Q. Did you have any other conversations besides those you have related, Mr. Sandoval, with Mr. MacKay, regarding the sale of the San Francisco mine and the consideration therefor?
A. Yes, I had another conversation with him in Altar.
Q. What was that conversation and when and who were present?
A. Mr. MacKay, in the presence of Ricardo Gayou, who was superintendent of the mine, told me that he had found out the price that I had paid, that I had paid twenty thousand dollars Mexican money, and I told him that I didn't have to sell it to him at the price I had bought it and I said I sold it to you for twenty thousand dollars gold and it is immaterial what price I paid for it.
Q. And knowing that, what followed then?
A. Nothing followed. I told him that and he seemed to accept my explanation.

88 Mr. IVES: Move to strike out "He seemed to accept my explanation.
The COURT: That may be stricken out as not responsive.

Q. And is that all that was said at that time?
A. That is all that was said at that time, Mr. Gayou was present and heard this conversation.
The COURT: Did you say when and where that conversation was?
A. It was in Altar the 20th of May, 1905.

Mr. ORFILA: Take the witness.

Examination.

By Mr. IVES:

Q. In Mexico, Mr. Sandoval, the consideration expressed in a deed transferring mines determines the amount of taxes to be paid thereon, does it not?
A. Yes, sir.

Q. It is not infrequent or uncommon to express a less consideration than the actual consideration to lessen the amount of taxes?

Mr. WILLIAMS: I object to his taking from this inexpert witness testimony as to what is the law of a foreign country.

The COURT: Objection overruled.

A. I can't say that. It should not be done.

Q. What mining property did you sell to Mr. MacKay, or any of his associates, other than the San Francisco mine?

89 Mr. ORFILA: Object, not proper cross-examination.

The COURT: Objection overruled.

Mr. ORFILA: Exception.

A. What property did we sell them?

Q. Yes?

A. A concession that we had from the Mexican government.

Q. And you sold that to him before your trip to El Tiro?

A. Yes, sir.

Q. And when you testified that you went to El Tiro with respect to other matters for Mr. MacKay and his associates, what were the other matters?

A. That was the only exception.

Q. That had been sold sometime before?

A. Yes, but we had to deliver it. We went there expecting to effect a transfer of this concession that had been taken up. We had denounced claims in Altar and I wanted to make arrangements for his taking the ground.

Q. Is it not a matter of fact, Mr. Sandoval, that long prior to that time, in the city of Nogales, Sonora, Mexico, in the presence of Mr. Ives, you had transferred the Sandoval concession to Mr. MacKay and his associates, the name being the American-Mexican Goldfields Company, and that the stock of that company was put up

90 with your knowledge and consent in the bank as a full acknowledgment of the concession?

Mr. ORFILA: It does not state when.

The COURT: Objection overruled.

A. I had certain property—I never did transfer that concession to this company that he mentioned.

Q. You transferred that concession to whom?

A. The Llanos de Oro, Mexican company.

Q. The Llanos de Oro was a Mexican company—was a corporation organized under the laws of Mexico and its stock was owned by the American-Mexican Goldfields Company?

A. I don't know.

Q. Were you not a stockholder in that company?

A. I don't know that the stock in the Llanos de Oro was transferred to the American-Mexican Goldfields Company.

Q. Was the stock of the American-Mexican Goldfields Company issued to you?

A. Part of it was.

Q. Practically all of it?
A. You didn't ask me that.
Q. As a matter of fact was not substantially all of the stock of the American-Mexican Goldfields Company issued to your concern first; isn't that true?
A. It may have been, I don't know.
91 Q. And the stock was sold by you to Mr. MacKay and his associates—part of it for cash and part of it placed in escrow in the Farmer's and Merchant's Bank in the city of Los Angeles to secure a hundred and fifty thousand payment?
A. That was a different transaction.
Q. That embraced the Sandoval concession, did it not?
A. Yes, sir.
Q. And it took place prior to your trip to El Tiro, did it not?
A. No, it did not; it was afterwards.
Q. I'll ask you to look at these escrow instructions to the Farmer's & Merchant's Bank, dated in March, 1905, and ask you if those escrow instructions were not with respect to the stock of the company which——
A. These instructions are dated the 29th of April and my trip took place there before this time.
Q. I call your attention to the certificate of the Mexican consul and ask if it is not dated the 24th of March, 1905?
A. That is when the document was recorded there.
Q. And this document was recorded after the transfer of the Sandoval concession by you?
A. It may have been.
Q. It certainly was?
92 A. It may be.
Q. Therefore, then when you made your trip to El Tiro the Sandoval concession had been transferred absolutely by you?
A. It had not been transferred absolutely because there were some denouncements which were made over and we transferred it the latter part of April or early in May.

Mr. IVES: I offer the document in evidence.
Mr. ORFILA: It is immaterial and not cross-examination and no foundation laid.
The COURT: It may be admitted.
Mr. ORFILA: Exception for the defendant.
Mr. IVES: Under the objection and exception we withdraw it rather than give them any benefit of the exception to it.
Mr. IVES: That is all.

Examination.

By Mr. ORFILA:

Q. Was the San Francisco mine embraced within the Sandoval concession to which counsel has referred in the last few questions to you?
A. No sir, it is not embraced in it.

Examination.

By Mr. IVES:

Q. What was there at El Tiro, what office was there there which had any connection with the Sandoval concession?

93 A. I don't know of any.

Q. Your reason for going to El Tiro was to see the Grijalvas and Ortiz—they lived there?

A. I went with regard to a matter of the Llanos de Oro concession.

Q. What was there at El Tiro that concerned the property?

A. It was the appointment of a chief of police there. They had been having great trouble with drunkenness and disorder on account of it being a new place and one of the objects was to see about appointing a good man in charge of the office of chief of police.

Q. And that had to be done at El Tiro?

A. Yes, sir, for Mr. MacKay's benefit.

Examination.

By the COURT:

Q. Did your trip to El Tiro have anything to do with the consummation of the sale of the San Francisco mine?

A. Yes, sir.

Q. What did it have to do with that?

A. I had to get the deed signed by one of the brothers who had not signed.

RICARDO GAYOU, called as a witness on behalf of the defendants, being first duly sworn testified as follows:

94 Examination.

By Mr. ORFILA:

Q. What is your name?
A. Ricardo Gayou.
Q. How old are you?
A. Fifty-six.
Q. What is your business?
A. Mining engineer.
Q. Where do you reside?
A. Nogales.
Q. Arizona or Sonora?
A. Sonora.
Q. Do you know Mr. MacKay?
A. Formerly of Llanos de Oro?
Q. I think it is the same gentleman?
A. I know a tall gentleman.
Q. I don't know, I have never seen him, H. S. MacKay?
A. Yes, I know him.
Q. Do you know Mr. Sandoval?
A. Yes, sir.

Q. Do you know Gerardo Ortiz?
A. Yes, sir.
Q. Santiago Grijalva?
A. Yes.
Q. And Ignacio Grijalva?
A. Also, yes sir.
Q. Did you know all of those parties in the spring of 1905?
95 A. Yes sir, I did.
Q. Did you see Mr. MacKay in Sonora in the spring of 1905?
A. Yes sir.
Q. Did you have any conversation with Mr. MacKay with reference to the purchase and sale of the San Francisco mine in the Altar District?
A. Yes sir.
Q. Where was that conversation had and who if anyone was present?
A. At a place called San Francisco de Oro and later called El Boludo.
Q. Who were present?
A. I spoke to the gentleman on many occasions but I don't recollect who was present. On some occasions there was Mr. Lindsay and others also other parties.
Q. What did Mr. MacKay—or when, do you remember, was the first time that you had a conversation with Mr. MacKay with reference to the San Francisco mine?
A. It was some days after the 7th of—or the beginning of April was when I arrived there. When we went to El Boludo, it must have been the first half of the month.
Q. Were you, about that time, in the employ of any company with which Mr. MacKay was in any way connected?
A. I was first employed by Sandovals in their mines and
96 afterwards I was superintendent of the Llanos de Oro.
Q. Were you superintendent of the Llanos de Oro at the time this conversation was had with Mr. MacKay?
A. The first few days, no; and afterwards, yes.
Q. What conversation did you have there the fore part of April?
A. We were talking so much about mines and placers and this and that and the other that I don't exactly recollect what was talked, but when I was in their employ, later, I knew the country and all the people around there and they told me I could do something for them and to look around.
Q. Who was "they"?
A. I mean Mr. MacKay and Mr. Lindsay.
Q. They told you to look around and what did you do?
A. I looked over some property and they asked me if I thought that the Esmiralda was good and other mines and if I could get any of those mines which I liked to buy for them, not to buy but to see if I could get it.
Q. What was said about the San Francisco mine, if anything?

A. That is the Ortiz mine?
Q. Yes?
A. They were producing lots of goods then.
97 Q. What did they say about that?
A. They would like to have that and the Esmiralda and the Elisa and that I could do something for them in offering for them a certain amount for the Esmiralda, a hundred thousand dollars, and I could offer——

Mr. IVES: I object to this.

Mr. ORFILA: Leave that out; about the San Francisco is what we want to know.
A. That I should try to get that mine? I offered something like thirty thousand dollars for it——
Q. Mexican money?
A. Mexican money, yes.
Q. To whom?
A. To Ygnacio and the other boy, I don't remember his name.
Q. Did you make the offer?
A. I talked it over with them.
Q. Did you at any time inform——
A. I told them that they could not do anything with that, that they had a contract with Sandoval.
Q. Who told this?
A. Grijalva, the old one told me, whatever he did the other two would agree to.
Q. What did you reply to Mr. MacKay after you had seen these people?
A. I don't know if I talked the matter over again with
98 him, I don't remember; I must have spoken to him about it.
Q. About this particular mine?
A. I am trying to think.
Q. Do you remember whether you reported that to MacKay?
A. I do not.
Q. Do you remember whether you had any conversation with Mr. MacKay with reference to the San Francisco mine after you saw the Grijalvas?
A. I must have, yes.
Q. Did you tell Mr. MacKay whether or not you could get the mine from Mr. Grijalva?

Mr. IVES: It is leading.
The COURT: It may be answered.

A. I don't recollect just this minute, if I did I don't recollect.
Q. Did you, after your talk with the Grijalvas, in which they said to you that they were tied up with Mr. Sandoval, report that conversation to Mr. MacKay?
A. I answered I do not remember, but undoubtedly I must have said something about it—that was my business,—but actually I don't remember; but there is no doubt I must have done it because it was to my interest to but I don't remember.

Q. Did you hear any one talk with Mr. MacKay or tell
99 Mr. MacKay, about the time that he asked you to go to these people, Ortiz and Grijalva, to try and get the property, that the Sandovals had the property tied up?

Mr. IVES: I object to that as leading; I have been allowing him to go a long distance, but not an indefinitely long distance.
The COURT: Objection sustained.

Q. When you had a talk with Mr. MacKay about the San Francisco mine, at any time during the month of April, did you inform him that the Sandovals had the option on that property?

Mr. IVES: Leading.
The COURT: I will let it be answered.

A. After they told me I must have said it to him, of course.
Q. Do you know whether you did or not?
A. Let me be frank, you ask me so many questions I am confused. You simply asked what I remember?
Q. Yes, do you remember whether or not you did inform him?
A. Who, MacKay?
Q. Yes, that MacKay had the option on the place.
A. When Grijalva spoke to me about it he told me that it was compromised with Mr. Sandoval and of course I must have said it
100 to Mr. MacKay, but I do not remember if I did or when it was or whether it was morning or evening but I must have done it.

Mr. IVES: I move to strike out "I must have done it."
The COURT: It may stand for what it is worth.

Q. Do you know whether or not Mr. MacKay knew, if you know——

Mr. ORFILA: Withdraw that.

Q. Do you know that Mr. Sandoval had the option on this property from the Grijalvas and Ortiz.

Mr. IVES: Objected to as immaterial.

Q. At the time Mr. MacKay wanted you to deal with the Grijalvas and Ortiz.

Mr. IVES: Objected to as immaterial.
Mr. ORFILA: Withdraw the question.
Mr. ORFILA: That is all.

Examination.

By Mr. IVES:

Q. You are a brother-in-law of Mr. Sandoval's are you not?
A. Yes sir.
Q. Do you remember whether or not in or about April, 1905, Mr. Sandoval asked you to deliver that letter to Mr. Ortiz?

Mr. ORFILA: We object as it is not proper cross-examination.
The COURT: Objection sustained.

Mr. IVES: That is all.

101 Mr. IVES: I will admit that Mr. A. Sandoval will testif if present, to what in their affidavit for continuance th say he will testify.

The COURT: I deem it advisable to keep the case open until l can arrive tomorrow morning.

The COURT: With the understanding that the case be rested upo taking the testimony of Mr. A. Sandoval it is continued until 9.3 a. m., April 11, 1907.

The COURT: I would like to ask Mr. P. Sandoval a few question

P. SANDOVAL, recalled as a witness on behalf of the defendant having been previously sworn, testified as follows:

Examination.

By the COURT:

Q. In your dealings with Mr. MacKay you arranged to sell som property familiarily termed the Sandoval concession, to Mr. MacKa and his associates?

A. That sale was made by my brother to Mr. MacKay and his a sociates.

Q. Did you have anything to do with that yourself?

A. It was ratified by me.

Q. In your name?

102 A. In the name of the firm—P. Sandoval and Company

Q. That embraced property, as I understand it, surroun ing the San Francisco claim?

A. It embraced a zone within which this San Francisco mine located but the San Francisco property, as well as others, had the title in favor of some one else with which we had nothing to do.

Q. Then the Sandoval concession did not include the San Fran cisco mine? The meaning of the expression "Sandoval Concession was not descriptive of the property already acquired, it was merel a matter of explanation?

A. It was to denounce land and get the title of property.

Q. Did you convey to Mr. MacKay and his associates no othe real estate than the San Francisco claim? During the time that w had the concession, before we transferred it to Mr. MacKay, we d nounced some land under the conditions of our concession. Thos claims were transferred to the company that was later organized.

Q. About when was that done?

A. I think in May.

Q. When were those denouncements made?

A. I think somewhere about February, 1905.

Q. Was there any considerable extent of territory embraced i those denouncements?

A. Yes, I think about twelve.

103 Q. Where were they situated with respect to the San Fran cisco claim?

A. Some of them were adjoining the San Francisco.

Q. Then there were some denouncements made before you transferred the San Francisco?

A. Yes, quite a number of them.

Q. Was it not a fact, Mr. Sandoval, that you stated to Mr. MacKay that you would endeavor to get the San Francisco on as reasonable terms as possible in order to help promote the general project involved in floating the Llanos de Oro?

A. No I did not offer to get the property for him. I offered to sell him the property.

Q. Did you not tell him that the terms would be made as low as you could get it?

A. No sir. All that transpired on that occasion was that he said he wanted the San Francisco mine, those are the exact words he used; and I told him I would sell it to him or let him have it for twenty-five thousand dollars, but I never offered to buy it from him.

Q. As a matter of fact you did not have the title to it at that time?

A. I did have.

Q. Was it not granted from two of the three owners?

A. I had the title in that document there.

104 Q. You may have the title papers, running to the Grijalves?

A. Yes sir?

Q. But you didn't have a conveyance executed by the Grijalves and Ortiz to you?

A. No sir.

Q. You had an agreement to sell it executed by two of them only?

A. Yes sir.

Q. The three had not made the transfer.

A. No sir.

Q. Then you mean that you had the title papers deposited with you?

A. Yes, and their obligation to transfer the title within six months' time.

Q. Two of them?

A. Three, he contracted for his brother.

Q. But his brother did not sign it?

A. He had not signed it yet.

Q. Were you taking any interest in the promotion of the Llanos de Oro at any time?

A. When we transferred the concession we transferred it for the sum of twenty thousand dollars that was going to be paid in instalments and besides Mr. MacKay obligated himself to give us one fourth of the stock of the company that was going to be organized to develop the property.

105 Mr. IVES: And that was an option for a hundred and fifty thousand dollars?

A. Yes sir.

Mr. IVES: And so you were interested in the enterprise to the extent of having them give you a hundred and fifty thousand dollars?

A. Yes sir.

Q. Did you have any understanding with Mr. MacKay as to what should be done with the San Francisco?

A. Not the least.

Q. Didn't you have an understanding that it should be transferred to the Llanos de Oro Company?

—. No, the sale was made personally. I imagined it was to be transferred but he did not tell me so; he was contracting in his own name.

Mr. IVES: You knew Mr. Sandoval, as a matter of fact that Mr. MacKay was purchasing that mine for Mr. Randolph and his associates, didn't you?

A. No sir, I had no means of knowing because he never told me that.

Q. Didn't you believe it?

A. I had an idea it might be for the company, not for Mr. Randolph and Mr. Lindsay, I had an idea it was for the company but he never told me it was for the company. I couldn't guess
106 it was going to be transferred to the company or anybody else or for what consideration it was going to be transferred.

The COURT: Do you know who brought the San Francisco claim to Mr. MacKay's attention?

A. I don't know.

Q. Who first mentioned the matter, you to him or he to you?

A. He mentioned the matter to me.

Q. What was the first statement he made with regard to the San Francisco mining claim as near as you can recall it?

A. He told me he wanted to get that property, that he wanted to get the San Francisco, it was important for him to get it, and he further stated that he was in a great hurry to get it and that is one of the reasons that I went to see if I could settle the matter of that contract.

Mr. IVES: Did not you know that Mr. MacKay could not be interested personally in the procurement of the San Francisco mine except in connection with the machinery the Llanos de Oro Company was putting up?

A. I did not know that; there was no machinery there.

Mr. IVES: It was being put up?

A. It had not been there.

Mr. IVES: It was ordered?

A. Ordered, I had heard it was.

Mr. IVES: You had not heard about it?

107 —. I knew it was going to be done or ordered, that was the object to buy the concession.

Mr. IVES: You had not heard that the company was expending some hundreds of thousands of dollars for putting up machinery in that vicinity to work that class of property?

A. I heard they were going to.

Mr. IVES: And you believed it?

A. Yes sir.

Mr. IVES: And you believed it at the time you sold that property Mr. MacKay?
A. Yes sir.
Mr. IVES: Didn't you believe that Mr. MacKay was purchasing the operty for the company?
A. I had an idea.
Mr. IVES: Didn't you believe it?
A. I did not.
Mr. IVES: And that is as true as anything else you have testified ?
A. ——.
The COURT: These documents had been made before the sale of e San Francisco placer property?
A. Yes sir.
Q. The San Francisco itself was a placer property?
A. Yes sir.

The COURT: That is all.
08 The COURT: The further hearing of this case is continued until 9:30 a. m., April 11th, 1907.

APRIL 11, 1907.

A. SANDOVAL, called as a witness on behalf of defendants, being rst duly sworn, testified as follows:

Examination.

By Mr. ORFILA:

Q. State your name, Mr. Sandoval?
A. Aurelio Sandoval.
Q. You are a brother of P. Sandoval, are you not?
A. Yes sir.
Q. And a member of the firm of P. Sandoval and Company?
A. Yes sir.
Q. Where do you live Mr. Sandoval and where did you live in the pring of 1905?
A. In Los Angeles.
Q. Do you know Mr. MacKay, Henry Squires MacKay?
A. Yes sir.
Q. Did you know him in the spring of 1905?
A. Yes sir.
Q. Do you know Mr. Randolph?
A. Yes sir.
Q. You knew him also in that year?
A. Yes sir.
109 Q. Do you know Mr. Lindsay?
A. Yes sir.
Q. Lycurgus Lindsay?
A. Yes sir.
Q. Mr. Sandoval, did you on or about the 24th day of March, 1905, in the city of Los Angeles or in the Pacific Electric Building in that city, have any conversation with Mr. Lycurgus Lindsay re-

garding the sale or the purchase of the San Francisco mine in the Altar district, state of Sonora, Mexico?

A. No.

Q. Did you at any time in the spring of that year or at all in that year have any conversation with Mr. Lycurgus Lindsay, at the Pacific Electric Building or elsewhere in the city of Los Angeles, regarding the sale or the purchase of the San Francisco mine in the Altar district, state of Senora, Mexico?

A. No.

Q. Did you have any such conversation with Mr. Lycurgus Lindsay in the spring of that year or at all in that year wherein Mr. Henry Squires MacKay was present with Mr. Lindsay, any conversation with Mr. Lindsay regarding the sale or the purchase of the San Francisco mine in the Altar district, state of Sonora, Mexico?

A. No, none.

Q. When was the first time, if at all, the San Francisco
110 mine, referred to in the preceding questions, was spoken of by Mr. MacKay and yourself?

A. When he returned from Sonora he told me he had purchased it from my brother.

Q. Do you recollect about when that was?

A. No.

Q. Do you know whether it was the spring or what month after he came back from Sonora that he said to you that he had purchased it from your brother?

A. It was more than two months after March.

Q. 1905?

A. Yes sir.

Q. Was Mr. Lindsay present at that conversation you had with Mr. MacKay?

A. No sir.

Q. What conversation did you and Mr. MacKay have or what did he tell you regarding the purchase or the circumstances attending the purchase of the mine, San Francisco, from your brother on that occasion?

A. He came to my office in Los Angeles, I don't know that it was for that purpose or just to call on me as he usually did, but he told me he had purchased from my brother.

—. Had he had any conversation with you previous to that with regard to the purchase of the San Francisco mine?

111 A. No.

Q. Did you know before that time that your brother had purchased the San Francisco mine?

A. No sir.

Q. Did you know that your brother had purchased it or contracted to purchase it or had an option on it in the month of January, 1905, at the time he spoke to you?

A. No, the first knowledge that I had was when Mr. MacKay told me that he had bought it from my brother.

Q. And that two months would bring it about May?

A. I couldn't say but it was after I made a contract with Mr. MacKay about other property.

Q. How long have you lived in Los Angeles?

A. Since May, 1904.

Q. Have you had charge of the office since that time?

A. No.

Q. Who conducts the business of the firm or has represented the business of the firm, since you left for Los Angeles in 1904, in the state of Sonora and also in Nogales, Arizona?

A. My brother, P. Sandoval.

Q. Does your brother report to you all the transactions and dealings that he has at this end?

A. No.

112 Q. Did you, in the month of March, 1905, or the spring of 1905, state to Mr. MacKay or Mr. Lindsay or either of them, that you and your firm would act as agent for them or him in the purchase of the San Francisco mine?

Mr. IVES: We object.

The COURT: Objection overruled.

A. No.

Q. Did you at any time, or at any time in the spring of 1905, tell Mr. MacKay or Mr. Lindsay, or either of them, that you could buy the San Francisco mine for them at better terms than what they could by reason of your familiarity with the Grijalvas and Ortiz, the owners of the San Francisco mine, and also by reason of your knowledge of the language they speak?

A. I didn't mention anything about the San Francisco to either of them.

Q. About September 29th, 1906, at the office of the Llanos de Oro Company, at the Pacific Electric Building, in the city of Los Angeles, California, did you meet Mr. Epes Randolph and Mr. Lycurgus Lindsay together?

A. Yes sir.

Q. What conversation took place between yourself and Mr. Randolph at that time regarding the San Francisco mine, if any?

113 A. He told me that they had found out that you, he didn't say whether it was me or my brother or the house, had purchased the San Francisco for twenty thousand dollars Mex. and sold it to the Llanos de Oro for twenty thousand dollars gold which was not the agreement that my brother had with Mr. MacKay and that my brother had to refund that money.

Q. What did you say to that?

A. I said I didn't know anything of the sort, that they had to arrange it with him.

Mr. ORFILA: That is all.

Mr. IVES: That is all, no questions.

Examination.

By the COURT:

Q. In that conversation with Mr. Randolph did you tell Mr. Randolph that the owners of the San Francisco mine had been indebted to you or your brother or your firm and that the increase in the price had something to do with this debt?

A. No sir.

Q. You never said anything about the debt at all?

A. What I told him was that my brother was the only one that knew anything about the proposition. I had some stock in escrow at the time and he asked me if my brother had some interest in the stock and if he had he said he was going to attach that.

Q. You didn't say anything about the debt?

A. No sir.

114 Q. Did you know who had owned the San Francisco mine?

A. Yes.

Q. When did you first know who was the owner of the San Francisco?

A. A long time. About the time we got the concession. I made a trip to get some work started.

Q. You knew that the Grijalves and Ortiz owned it?

A. Yes sir.

Q. Did you at any time ever make a statement to either Mr. Lindsay or Mr. MacKay that by reason of the Grijalve brothers being in debt to you or your house or your brother, that you were in position to get a good price on that property?

A. No sir.

Q. You never had any conversation with any of them about the sale of the mine, the San Francisco, before it was bought?

A. No, the first I had to do about it was after the purchase.

Q. You and your brother, at that time, were in partnership?

A. Yes, in the concession.

Q. And in all matters connected with the deals there?

115 A. No, the matter of the concession was in my hands exclusively.

Q. And in this deal, the sale of the San Francisco mine, with Mr. MacKay he was to fully represent both of you, was he?

A. As manager of the house here, yes sir.

The COURT: That is all.

Mr. ORFILA: That is all, that is the case.

Mr. IVES: We will submit it without argument.

Mr. ORFILA: Yes.

Certificate.

I, R. W. Sturgis, court reporter of the above entitled court, do hereby certify that I was present at the trial of the above entitled cause on April 10th and 11th, A. D. 1907; that I took notes of all orders, rulings, objections, questions propounded to and answers of

witnesses; that I have transcribed the same and that the foregoing twenty five (25) pages of typewritten matter contain a full, true and correct transcript thereof.

Witnes- my hand this 30th day of April, A. D. 1907.

R. W. STURGIS,
Court Reporter.

116 Accepted as correct, the depositions to be part of the record.

Oct. 7-'07.

E. S. IVES,
Att'y for Pl'ff.
A. ORFILA,
EB. WILLIAMS,
Att'ys for Def'ts.

PLAINTIFF'S EXHIBIT "A."

ALTAR, *May 21st,* 1905.

Mr. Gerardo Ortiz, City.

DEAR SIR: Please have the "San Francisco" mine, which you have sold to me on this date, delivered to the order of Mr. Henry S. Mackay.

Yours truly,
(Signed) P. SANDOVAL.

Correct copy.

E. S. IVES, *Pl'ff- Att'y.*

PLAINTIFF'S EXHIBIT "B."

HERMOSILLO, *April 24th,* 1907.

Mr. Gerardo Oritz, El Tiro.

DEAR SIR: This is to inform you that I wish to take possession of the San Francisco mine, without further delay, and I hope
117 you will in no way be inconvenienced to have the said property delivered to Mr. Ricardo Gayou, in a few days. I have today written to Mr. Gayou in regard to the matter.

The amount of first payment is at your disposal, as I verbally informed you, and you can draw against our firm at Nogales for same. It would be well to have your brothers start at once to Nogales to sign the papers and leave this matter settled.

I ask you to kindly keep to yourself the matter of the purchase of the San Francisco mine, and the price agreed, as I do not wish to have our projects meddled with.

Thanking you for the attention that I hope you will give my request, I remain,

Yours very truly,
(Signed) P. SANDOVAL.

Correct copy.

E. S. IVES, *Pl'ff- Att'y.*

DEFENDANTS' EXHIBIT No. 1.

In the town of Nogales, state of Sonora, republic of Mexico, on the twenty-third day of January, A. D. 1905, P. Sandoval, of full age, widower, banker and a resident of the said town of Nogales, as party of the first part, and Santiago Grijalva, Ygnacio Grijalva and Gerardo Ortiz, all of full age, engaged in mining, and resi-
118 dents of the mining camp of "San Francisco," district of Altar, as parties of the second part, have drawn and agreed to the contract contained in the following clauses:

I. The parties of the second part said: that they are the owners, in full domain of a gold, silver and copper mine called "San Francisco," covering an area of six "pertenencias," and situated in the mining camp of "El Tiro," jurisdiction of Altar, district of Altar and state of Sonora; that the said mine was adjudicated upon them by the president of the republic of Mexico, on the eighth day of February, A. D. 1903, under title number sixteen thousand five hundred sixty seven, exhibited in this act.

II. The said parties of the second part further stated that they have agreed to sell the described mining property, which has no boundaries, with right for redemption, to Mr. P. Sandoval, in consideration of one thousand and sixty Mexican pesos, which amount shall be paid at the time the parties of the second part sign this minute, and deposit same, ratifying their signature, in the notorial file of the Court of the First Instance of this place.

III. The parties of the second part further stated that the term in which the right of redemption shall be exercised, will be of six months from the date of this minute; and should the said
119 second part- fail to take advantage of the said right of redemption the sale will be irrevocably consum-ated.

IV. The second part- agrees to the eviction and clearance of the property, in due form.

V. The second part- further agrees to leave in possession of the party of the first part, the original title of the said "San Francisco" mine; and the said party of the first part agrees to facilitate the said original title for its presentation as exhibit in a case which is being followed by the said parties of the second part, at the present moment, before the District Court of the state of Sonora. The said original title shall be returned to the said party of the first part as soon as same is no more needed as exhibit in the above mentioned case.

VI. P. Sandoval said that he accepts and agrees to the preceding clauses, same to be what was agreed.

VII. Both part-s said that in this contract no lession has been caused as provided for in article 1658 of the Civil Code, but should it, at any time exist, they do hereby mutually and irrevocably agree to cede any excess, thus renouncing to the application for the recission in the term prescribed by article 1660 of the said Civil Code.

VIII. The parties of the second part further said that
120 should they not, at the expiration of the six months' term agreed to, take advantage of the right of redemption, and in further consideration of the sum of twenty thousand Mexican pesos, which shall be paid to them by the party of the first part, then, in that case, all the rights on the described mining property shall be transferred to P. Sandoval, and the sale considered as irrevocably consum-ated. This, of course, in the understanding that the parties of the second part are in such a *possession* as to take advantage of the right of redemption, and should the party of the first part offer the said sum of twenty thousand Mexican pesos, for it is mutually agreed that this clause does not, in any way, modify, affect or alter the nature of the present purchase contract, with right of redemption.

IX. Both part-s agree to file this contract in the notorial office in charge of the judge of the first instance of this place, and to further have a public deed drawn and executed in the moment any of the two part-s so desire.

The said parties of the second part said that they are able to deal freely, in disposing of their properties, as they are unmarried.

Before signing both part-s further stated that in the case of clause VIII, the sum of one thousand sixty Mexican pesos, already paid for
121 the sale with benefit of redemption, will be deducted from the twenty thousand Mexican pesos, in which the said right of redemption is estimated.

In witness whereof, we have hereunto set our hands and seal at above place and date.

(Signed) GERARDO ORTIZ.
(Signed) P. SANDOVAL.
(Signed) SANTIAGO GRIJALVA.

Approved as correct translation.

E. S. IVES, *Pl'ff's Att'y.*

DEFENDANTS' EXHIBIT No. 2.

Number Forty Three.—In the town of Nogales, Sonora, on the twenty fifth day of April, nineteen hundred and five, before me, Lawyer Tomas Lopez Linares, Judge of the First Instance, acting as notary public, and the official witnesses, Antonio Haro and Jose Maria Encinas, both of full age, residents of the said town of Nogales; the first single, with address at number one hundred fifty two "Calle de Arizpe;" and the second married, with address at number eight in the same street, appeared, as party of the first part, Prospero Sandoval, of full age, widower, banker and resident of the said town of Nogales, and Henry S. Mackay, as party of the second part, of full age, married, engaged in mining, residing at Los Angeles, California, and accidentally in the said town of Nogales.—The party of the second part being accompanied by the inter-
122 preter, Alfredo Sandoval, of full age, married and resident of the said town of Nogales; who protested in the legal form;

to all of which the subscribing notary public certifies, also that they all have civil and full capacity to contract and obligate themselves.—The said P. Sandoval, by himself, and H. S. Mackay, through the interpreter said: That they have mutually agreed to execute a purchase contract and this instrument, the same is contained in the following clauses:

First. P. Sandoval said that he is the legitimate owner, in full domain and possession, of the gold, silver and copper mine, covering an area of six pertenencias, called "San Francisco," situated at about four kilometers north of the mining camp of "El Tiro," municipality and district of Altar, state of Sonora, without any boundaries: the surrounding ground being undenounced, as it appears in the map and original title issued by the president of the republic of Mexico on the eleventh day of February, nineteen hundred and two, under number sixteen thousand five hundred and seventeen, in favor of Gerardo Ortiz, Santiago Grijalva and Ygnacio Grijalva, and from whom the said P. Sandoval acquired the said "San Francisco" mine, as per public deed numbered forty-two, drawn before the subscribing notary public, under date of the twenty second day of April, nineteen hundred and five. The sub-
123 scribing notary public also certifies to have had before him all the documents referred to, which he returned to their owners, duly signed and sealed.

Second. P. Sandoval do- hereby sells to Henry S. Mackay, without any restrictions whatsoever, and with all the rights pertaining thereto, the said "San Francisco" mine, as described in clause first, declaring at the same time that this mine is not in any way affected; and for this reason he further agrees to its eviction and clearance, in the terms prescribed by the law.

Third. Consideration of this sale or purchase price will be the sum of twenty thousand dollars of the United States of America, of which sum the said H. S. Mackay has paid to the said P. Sandoval, three thousand dollars, receipt of which is hereby acknowledged by the said P. Sandoval, who at the same time renounces the exception of undelivered money and to the dispositions of articles 1093 and 1094 of the Civil Code. The balance of seventeen thousand dollars must be paid by the said H. S. Mackay to the said P. Sandoval, in said town of Nogales, as follows:

I. Five thousand dollars on the 24th day of October, 1905;

II. Twelve thousand dollars on the 24th day of April, 1906.

Fourth. The said H. S. Mackay will at once proceed to
124 take possession of the mine, and he hereby agrees to pay to the said P. Sandoval, fifty per cent (50%) of the mine proceeds or products to be applied to purchase price, in such a manner that, should the said fifty per cent of the mine proceeds, be enough to cover the $17,000—still unpaid, then in that case, no more payments shall be made on account of the said mine.

Fifth. Should the said Henry S. Mackay fail to make any of the payments when due, or otherwise fail to comply with any of the stipulations provided for in this contract, same shall be rescinded

by full right for this one circumstance, considered null and the mine shall revert back to the seller; the purchaser losing in that case all the amounts which might have been paid as part of purchase price, as well as his right to own the buildings and other improvements which might have been installed at the mine.

Sixth. H. S. Mackay has the right, if convenient to his interests, to return to P. Sandoval the above described mining property, at any time, but in all instances, losing, in favor of the said P. Sandoval everything mentioned in the preceding clause.

Seventh. The said H. S. Mackay said: That he hereby accepts the sale, under the stipulated conditions; acknowledges receipt of the map and original title of the said "San Francisco" mine,
125 as well as of a testimony of deed number forty-two, and agrees to pay to the said P. Sandoval, the amounts which are still due, in the stipulated terms.

Eighth. Both part-s said: That in this contract, there is no lesion caused, as defined in article 1658 of the Civil Code, but should it, at any time exist, they do hereby mutually and irrevocably cede any excess, thus renouncing to the application for rescission prescribed in article 1660 of the said Civil Code.

Having read this instrument to both part-s: to P. Sandoval by the notary public, and to H. S. Mackay through the interpreter, and well aware of the value and force of its contents, which were clearly explained to each one of them, they expressed their conformity. In witness whereof, they signed, together with the interpreter and official witness. I do hereby further certify, that after reading this instrument to both contracting parties, they said: That they have agreed to place in escrow, in the branch of the Banco de Sonora, at Nogales, Sonora, a copy of this instrument, the original title, map and testimony referred to in clause seventh, in order that, should the said institution not receive from H. S. Mackay, in due time, the amounts mentioned in this document, to be paid to P. Sandoval, all escrow papers shall be returned by the said Banco de Sonora
126 to said P. Sandoval. In witness whereof, we have hereunto set our hands and seal. (Signed) P. Sandoval, Henry S. Mackay, Alf. Sandoval. Official witnesses: A. Haro and J. M. Encinas. Official Seal. Lic. T. Lopez Linares.

A seal reading as follows: "Republic of Mexico. Court of the First Instance—Judicial District of, Nogales, Sonora."—To the chief revenue stamp collector, city.—I do hereby make it known to you that under this date and number forty three, a deed has been executed and drawn before me, in which P. Sandoval sells to H. S. Mackay the "San Francisco" mine, situated in the district of Altar, in consideration of the sum of twenty thousand dollars United States gold. Therefore, an exchange is today quoted at 203%, and as provided to in the fraction twenty-three of the stamp law tariff, a tax of two hundred eighty four Mexican dollars shall be collected on the above deed. Liberty and Constitution. Nogales, 25th of April, 1905.—(Signed) Lic. T. Lopez Linares.

On Margin, number ninety-eight. A seal reading as follows:

"Chief Revenue Stamp Collector's Office—Nogales." The undersigned, chief revenue stamp collector, do- hereby certify: That stamps
127 for the amount of two hundred eighty four Mexican dollars, and twenty cents were this day pasted and cancelled on this document, as per the preceding liquidation made under the responsibility of the subscribing notary public.

This third copy was taken from its original, on the 3rd day of April, A. D. 1907, upon application made by P. Sandoval. Same is written in five pages, duly signed and certified by the subscribing notary public, and with lawful stamps.

In witness whereof, the undersigned, judge of first instance, acting as notary public, has hereunto set his hand and seal of office, at Nogales, Sonora, Mexico, on the date above mentioned.

(Signed) LIC. M. MIMIAGA.

Approved as correct translation.

E. S. IVES, *Pl'ff's Att'y.*

Satisfactory proof having been made to me that this transcript has been submitted to E. S. Ives, Esq., and has been accepted by him as correct, I certify the same as correct, this 12 day of October, 1907.

FREDERICK S. NAVE, *Judge.*

128 In the Supreme Court of the Territory of Arizona.

No. 1028.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
EPES RANDOLPH, Appellee.

Appeal from the District Court of Santa Cruz County.

Hon. Frederick S. Nave, Judge.

Appearances:

A. Orfila and Eb. Wil[illegible]ns, Attorneys for Appellants.

Eugene S. Ives, S. L. Pattee and S. V. McClure, Attorneys for Appellee.

An action was brought in the District Court of Santa Cruz County by the appellee against the appellants for a sum of money alleged to have been paid by the appellee and his assignor, L. Lindsay, to the appellants, for the purchase of the San Francisco mine, in the State of Sonora, Republic of Mexico, by the appellants as the agents of the appellee and his assignor, Lindsay. From a decision for the plaintiff, the defendants appealed.

The facts found by the trial court, before whom the case was tried, without a jury, are as follows:

"In or about the Spring of 1905, the defendants, A. San-
129 doval and P. Sandoval, entered into a certain agreement with the plaintiff and one Lucurgus Lindsay, whereby the defendants agreed that they on behalf of the said plaintiff and the said Lindsay would undertake to purchase for them a certain mining claim called the San Francisco mine, in the Altar Mining District, in the State of Sonora, Republic of Mexico, at the lowest possible price.

Thereafter the said defendants, in pursuance of such agreement, and on behalf of the said Lindsay and this plaintiff, did purchase the said mining claim from the owners thereof, for the full consideration of twenty thousand dollars Mexican silver, and that the defendant P. Sandoval as co-partner of the defendant A. Sandoval, did thereupon obtain a deed of the said mining claim from the original owners thereof, and did pay therefor the sum of twenty thousand dollars Mexican silver and no more; and the said defendants did thereupon, and in further pursuance of said agreement procure the said P. Sandoval to convey the said mining claim to one H. S. MacKey, who was the agent of the plaintiff and of the said Lindsay; and the said Lindsay and the plaintiff in pursuance of said agreement, and in the belief that the defendants had paid for the said mine the said sum of twenty thousand dollars American gold, did pay to the defendants the said sum of twenty thousand dollars American gold.

The plaintiff and the said Lindsay paid the said sum of
130 twenty thousand dollars in gold in three separate installments, the last thereof being paid on the 25th day of May, 1906, for the sum of twelve thousand dollars American gold.

The said sum of twenty thousand dollars Mexican silver paid by the defendants to the original owners of the said mining claim was worth in American gold the sum of ten thousand dollars at the time the said payments were made.

The said Lycurgus Lindsay prior to the commencement of this action, duly assigned his claim against the defendants arising out of the aforesaid transaction to the plaintiff for a valuable consideration."

The first error assigned by the appellant is that the complaint does not state facts sufficient to constitute a cause of action, and is subject to a general demurrer. No general demurrer was interposed in the lower court prior to the trial, hence no error was committed by the trial court in permitting the case to come to trial. It would be error to render a judgment on a complaint so fatally defective as to be insufficient to support a judgment, but such error is not assigned. However, if the record should disclose that the complaint was not sufficient to support a judgment, the rendition of a judgment thereon would constitute fundamental error as manifest in the record, and the judgment would be reversed in the appellate court, even if the point was not raised by the appellant. It is urged by the appellant

that this is an action for fraud, and inasmuch as the com-
131 plaint does not contain the allegations of facts constituting fraud that are essential in a complaint for fraud, it fails for that reason to state facts sufficient to constitute a cause of action.

We cannot agree with the counsel for the appellant that the action *in* one of fraud. It is true that the complaint contains the words "with intent to deceive and defraud," but in addition to this charge, the complaint alleges, (omitting the part not pertinent to this question,) "the defendants agreed, as agent for Lindsay and the plaintiff * * * to buy a certain mine for the use and benefit of the said Lindsay and the plaintiff at the lowest possible price." "That thereafter * * * the said defendants did * * * as agents as aforesaid * * * purchase said claim * * * and pay therefor the sum of twenty thousand dollars Mexican silver." "And the owners of said claim did * * * convey the said claim to the defendants * * * and the said conveyance was accepted by the said defendants for the use and benefit of the said Lindsay and the plaintiff." "That the defendants * * * did report to Lindsay and the plaintiff that they had agreed to pay the owners of said mine twenty thousand dollars American gold therefor, and said sum was the lowest sum for which they could purchase the same from said owners, and that Lindsay and the plaintiff, relying upon said statements of defendants, did pay to the said defendants the sum of twenty thousand dollars American gold."

132 "That at the date when the defendants paid the said sum of twenty thousand dollars Mexican silver to the owners of said claim, the said twenty thousand dollars Mexican silver was worth the sum of nine thousand, six hundred dollars gold, and no more, and that by reason of the foregoing facts, the defendants became indebted to the said Lindsay and the plaintiff in the sum of ten thousand, four hundred dollars gold, and that they have not paid the same, or any part thereof, though often requested so to do."

The facts thus alleged in the complaint are sufficient to constitute a cause of action, without the necessity of alleging fraud. That being the case, the allegation of fraud that the appellant characterizes as defective and insufficient having been pleaded as matter of inducement only, is immaterial, and may be treated as surplusage, and the complaint, independent thereof, is fully sufficient to sustain an action of debt for money had and received.

Another error assigned is that the Court erred in overruling the demurrer of the defendants. This demurrer was urged upon the ground that the Court had no jurisdiction over the persons of the defendants, or the subject matter of the action. The record shows jurisdiction over the persons of the defendants acquired both by service of the summons and the copy of the complaint, and by a general appearance entered by their answer filed February 12, 1908.

133 As to the jurisdiction of the Court over the subject matter, this is a transitory action, and may be brought in any county where the defendants can be served with process. In Mostyn v. Fabrigas, 1 Cowp. 161, it is held that if "A" becomes indebted to "B" in Paris, an action may be maintained against "A" in England, if he is there found. And in this case Lord Mansfield said: "Any action which is transitory may be laid in any county in England,

though the matter arises beyond the seas." This doctrine in respect to transitory actions has been repeatedly affirmed in the Courts of the United States. I How. U. S. 241; 13 How. U. S. 115.

At the conclusion of the plaintiff's evidence, the defendants asked leave to file an amended answer, setting up the statute of limitations. The plaintiff refused consent to the amendment, and the Court denied the application. This denial is assigned by the appellant as error.

After the trial of a case has begun, the Court may, in its sound discretion, permit or refuse an amendment to the pleadings. This action, like any other that rests in the discretion of the trial court, will not be reviewed on appeal unless it is plainly shown that the lower court has abused its discretion. United States v. Atherton, 102 U. S. 372.

The statute sought to be pleaded by the proposed amendment was the limitation provided by Act 16, laws of 1903. The actions barred under this statute by the lapse of more than one year from
134 the discovery of the acts constituting the fraud are those brought to obtain equitable relief, which are based wholly on fraud, and in which no relief can be granted unless fraud be proven.

This action is not a bill in equity for relief on the ground of damage from fraud, but is a suit at law to recover money alleged to have been advanced to defendants as agents to pay the price of a mine purchased by them for plaintiff and Lindsay as principals. The complaint alleges that twenty thousand dollars gold was furnished defendants, and only nine thousand, six hundred dollars was paid by them, whereby they became indebted to the plaintiff in the sum of ten thousand, four hundred dollars gold, which was not applied to the purpose for which it was furnished, and remained in their hands, the property of their principals.

Before application to amend was made, it was established by undisputed evidence that of the money furnished defendants, twelve thousand dollars, which included all the excess over the price actually paid (for which excess this action was brought) was furnished in May, 1906. No cause of action arose prior to the receipt of the money by defendants, May 25th, 1906. This action was begun on the 26th day of November, 1906, six months after the statute began to run, consequently it is apparent that in refusing to permit the defendants to amend and plead the statute of limitations, the court deprived them of no defense.

135 The appellant assigned as error the findings of fact and conclusions of law of the trial court. The evidence is conflicting. There is abundent testimony to warrant the findings of the court. It is the rule that the appellate court will not disturb the findings of fact of the trial court based upon conflicting evidence when they are supported by any substantial testimony. The conclusions of law expressed by the trial court are proper, in connection with the facts as found.

The appellee calls attention to Section 23 of Chapter 74 of the laws of 1907 of the Territory of Arizona, and urges the enforce-

ment of the penalty therein provided. We do not assume the responsibility of holding that the appellant *was* in this case actuated in taking the appeal solely by the desire to delay, and therefore will not impose the penalty.

The judgment of the trial court is affirmed.

FLETCHER M. DOAN,
Associate Justice.

We concur:
EDWARD KENT,
Chief Justice.
RICHARD E. SLOAN,
Associate Justice.
JOHN H. CAMPBELL,
Associate Justice.

(Endorsed:) No. 1028. In the Supreme Court of the Territory of Arizona. A. Sandoval, et al. vs. Epes Randolph. Opinion. Recorded Book 7, Pages 405-411. Filed March 27, 1908. F. A. Tritle, Jr., Clerk.

136 In the Supreme Court of the Territory of Arizona.

EPES RANDOLPH, Appellee,
vs.
A. SANDOVAL & P. SANDOVAL, Appellants.

Appellants' Petition for Rehearing.

The appellants respectfully petition this Court for re-hearing in the above entitled matter.

A reading of the Opinion of this Court in the above entitled matter discloses no reference whatever to arguments made in the Reply Brief of Appellants. In view of the importance of these arguments, briefly referred to in Appellants' Opening Brief, but more fully set forth in the Reply brief, it has occurred to appellants that this Court may have failed to receive or to have called to its attention this Reply Brief.

The first of the arguments which this Court has overlooked in its Opinion is that mentioned on Pages Seven (7) to Eleven (11) of Appellants' Reply Brief. Appellants cannot state their argument on that point more forcibly than it is given on said pages of their Reply Brief and it is therefore by reference hereby made a part of this petition. The argument is that the appellants being practically
137 the owners of the mines in controversy at the time and prior to the execution of the alleged contract of agency in March, 1905, and until the mines were turned over to MacKay, the law would not tolerate the appellants standing in the relation of agents. For it is impossible to assume that a person can be at once the owner and the agent of another to purchase his own property. It is elementary law, when a man is the secret owner of property and is

employed as agent by a third party ignorant of that fact to purchase said property, that he can be held to continue in the relation of agent only by estoppel. But there can be no estoppel in this case for the reason that estoppel is not pleaded, that the facts constituting estoppel are not pleaded, and because the fact of ownership by appellants was proved by palintiff's own evidence and because no objection was taken to the evidence of appellants to the same effect. This ownership by appellants of the property in controversy is the one undisputed fact in the case: it involves no passing on the weight of evidence, contradiction of testimony, or any other question concerning the evidence which the Appellate Court cannot pass upon with the same effect as a trial Court. We have already pointed out that, assuming for purposes of argument that appellants were employed as agents to purchase the property, there would then be a remedy in damages against them for their concealment at the time of their employment of their real interest in the property by reason
of which plaintiff and his associates would have lost Ten
138 Thousand ($10,000) Dollars. But plaintiff's remedy would necessarily be an action for unliquidated damages, and such a judgment could not be given in this case for the reason that there is a fatal variance between the facts as to the title of the property in controversy, between the pleadings and the proof, and, secondly, because there are neither the necessary allegations in the complaint necessary to support a recovery of unliquidated damages nor the necessary proof to support the same. One absolutely indispensable article of proof would be the reasonable or market value of the property in controversy at the time of the alleged contract of agency. There is no evidence on this subject whatever.

It seems to appellants impossible that the judgment in this case should stand by reason of this defect alone, and we cannot see what argument can possibly answer this.

But not only does this interest, amounting practically to ownership under the Mexican laws, of appellants in the property in controversy prevent plaintiff from recovering under the pleadings and proof in this action, both by reason of variance and by reason of the defect of pleadings and proof, but it is equally important in another aspect of the case. That is, it makes it clear, under the facts in this case, that there could be no suit brought for recovery of damages but one grounded in fraud and pleaded expressly in that form, for the common counts for money had and received would not lie in a case
of fraudulent concealment of the real ownership of the prop-
139 erty where it had developed prior to the filing of suit and prior to the trial of the action and at the trial of the action that the presumptive agents were actually the real owners or actually controlled the selling price. This is so necessarily for several reasons, but particularly for the reason that the alleged contract of agency by its very peculiar terms in this case—that is, that the appellants should get the property at the lowest price for which Ortiz, et al., would sell it—was impossible of performance by reason of the fact that Ortiz, et al., had no control over the selling price. Plain-

tiff's only remedy therefore necessarily would be one not only grounded in fraud but expressly pleaded as such. The overruling therefore of defendants' second and special cause of demurrer was prejudicial error.

The opinion of this Court makes no reference to the question of non-assignability of the cause of action by Lindsay to plaintiff. In Appellants' Reply Brief (cf. Pages 21 to 24) it is argued that the cause of action in this cause is not assignable for the reason that under the facts in this case as proved at the trial the only theory on which a judgment could be rendered would be upon fraud or deceit and that such a cause of action is not assignable. We again urge the force of that argument; and we particularly ask this Court's consideration of the fact that MacKay also has an interest in this property according to plaintiff's evidence and that it does not appear
140 anywhere that plaintiff ever acquired such interest. Moreover, it does not appear how plaintiff is still claiming any interest in this controversy in view of his testimony that he, with his associates, was purchasing the mine for the benefit of the corporation which subsequently acquired it. It does not appear that this corporation did not reimburse him for his expenditures and it cannot be assumed in view of the facts disclosed that he was not reimbursed.

This Court states in its Opinion that the Twelve Thousand ($12,000) Dollar payment made to plaintiff and his associates to defendants in May, 1906, included all excess over the price actually paid to Ortiz, et al., for which excess this action was brought. If it is established therefore that the present cause of action is to recover a sum of money paid in May, 1906, four months after the discovery by plaintiff himself, and about a year after the discovery by plaintiff's agent MacKay, of the fact that there was paid only Ten Thousand ($10,000) Dollars gold for the property, then it is clear that plaintiff cannot recover anything. For it is elementary law that money paid voluntarily by one party to a contract after the discovery of fraud in the other party to the contract, is a waiver of such fraud, unless the payment is necessary to protect the innocent party in his rights. In this case, it will not, of course, be contended that plaintiff and his associates could not refuse to
141 pay at least Ten Thousand ($10,000) Dollars, assuming their version of the facts to be true—for they had already been secured in the property (and if they had not been secured they could have enforced it).

Wherefore, appellants respectfully petition this Honorable Court for a rehearing of said cause.

Respectfully submitted,

A. ORFILA,
EB. WILLIAMS,
Attorneys for Appellants.

HENRY S. VAN DYKE,
Of Counsel.

(Endorsed:) No. 1028. In the Supreme Court of the Territory of Arizona. Epes Randolph, Appellee, vs. A. Sandoval and P. Sandoval, Appellants. Appellants' petition for re-hearing. A. Orfila, Eb. Williams, Attorneys for Appellants. Henry S. Van Dyke, of Counsel. Filed April 11, 1908. F. A. Tritle, Jr., Clerk.

142 *Allowance of Appeal to the Supreme Court of the United States.*

In the Supreme Court of the Territory of Arizona.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
EPES RANDOLPH, Appellee.

The above named appellants, A. Sandoval and P. Sandoval, conceiving themselves aggrieved by the judgment of the Supreme Court of the Territory of Arizona made and entered on the 27th day of March, 1908, in the above entitled cause, and by the order of said Supreme Court of the Territory of Arizona denying a rehearing of said cause made and entered on the 18th day of May, 1908, and the record in said cause showing the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars, do hereby appeal from the said judgment and decree, and the order denying a rehearing, to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith and prays that this appeal be allowed and that a transcript of the record proceedings and papers upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

A. ORFILA,
EB. WILLIAMS,
Attorneys for Appellants.

Dated this 13 day of June, 1908.

143 The foregoing appeal is allowed and the judgment of the Supreme Court of the Territory of Arizona, and the judgment of the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Santa Cruz, in said cause, is stayed upon said appellants filing their supersedeas bond in the sum of Twenty Thousand Dollars, to be approved by any Justice of the Supreme Court of the Territory of Arizona.

Dated this 20th day of June, 1908.

JOHN H. CAMPBELL,
Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 1028. In the Supreme Court of the Territory of Arizona. A. Sandoval & P. Sandoval, Appellants, vs. Epes Randolph, Appellee. Allowance of appeal to the Supreme Court of the United States. Filed June 22, 1908, F. A. Tritle, Jr., Clerk.

144 Notaria Publica
A Cargo Del
Juzgado de Primera Instancia.

ler testimonio de la Escritura Pública número 112 de Protocolización de la Diligencias de Jurisdicción Voluntarias y documentos anexos relativos al poder, conferido por el Señor Aurelio Sandoval y su esposa Señora Luisa Parodi de Sandoval en la Ciudad de Los Angeles, California, á favor del Señor Prospero Sandoval, vecino de este lugar.

Nogales, Sonora, Mayo 26 de 1908.

[Court Seal.]

145 (Court Seal.—1 Peso Stamp.)

"Numero Ciento Doce.—En la Villa de Nogales, Sonora, á los veintiseis dias del mes de Mayo de mil novecientos ocho, Yó, el Licenciado Maclovio Mimiaga, Juez de Primera Ynstancia en funciones de Notario Público ante los testigos instrumentales Antonio Haro Jr., y Francisco Lino Rodriguez, ambos mayores de edad, empleados y de esta vecindad; el primero soltero con domicilio en el número nueve de la calle de Arizpe; y el segundo casado con habitación en el veintinueve de la de Camou, Doy fé tener á la vistay en ocho fojas útiles, las diligencias de Jurisdicción Voluntaria y documentos anexos, pr movidas en el Juzgado á cargo del subscrito Notario por el Señor Prospero Sandoval, solicitando mandamiento para protocolizar, el poder que con fecha veintidos de Abril del corriente año, otorgó á su favor el Señor Aurelio Sandoval y su esposa la Señora Luisa Parodi de Sandoval, en la Ciudad de Los Angeles, Estado de California, Estados Unidos del Norte, ante el Señor Licenciado Antonio Orfila. Notario Público en ejericio, cuya firma aparece legalizada por el Señor C. G. Keyes, Secretario del Condado de Los Angeles y Secretario ex-officio de la Corte Superior del mismo, habiendo subscrito el certificado respectivo, en substitución de éste el Señor R. Loundeslager, Secretario Diputado; habiendo sido legalizada la firma de este funcionario por la del Cónsul Mexicano en aquel lugar, Señor Antonio Lozano; y la de éste por la del Subsecretario de Relaciones Exteriores de Mexico, Señor F. Gamboa, el dia diez y seis del corrientes mes y año. En las referidas diligencias obra un auto que literalmente dice:—"Noagles, Sonora, Mayo " veintitres de mil novecientos ocho.—Por presentado el anterior " escrito con el poder y traducción á ocursante; fórmese expediente, " tómese razón y con fundamento de lo prevenido por el artículo— "458—cuatrocientos cincuenta y ocho—del " Código de Procedimientos Civiles, se nombra " perito para que hago el cotejo de los docu- " mentos que obran en idioma inglés, con la " traducción correspondiente en castellano, al

I. Cotejado.

146

Jul- 10, 1908. Court Seal. Escrit No. 912.

" Señor Luis M. Salazar, á quien sele hará saber su nombramiento y " en caso de aceptación, disciernasele el cargo en debida forma, á fin " de que, prévia la protesta de ley, diga si ratifica ó nó, la traducción " exhibida con el original y hecho lo expuesto, hágase la protocoliza- " ción que se ha solicitado, para lo cual remitanse originales en su " oportunidad, estas diligencias á la Notaria Pública adscrita á este " Juzgado, todo con citación y audiencia del Ciudadano Agente del " Ministerio Público. Así lo proveyó y firmó el Ciudadano Licen- " ciado Maclovio Mimiaga, Juez de Primera Ynstancia de este Par- " tido Judicial. Damos fé.—M. Mimiaga.—A.—A. Haro Jr. " Rúbricas.—A.—F. E. Martinez.—Firmado."—Ygualmente yó el Notario doy fé de que en cumplimiento del auto preinserto, protocolizo en este acto las diligencias y documentos anexos, agre-
147 gándolos al efecto al apéndice del protocolo en legajo que lleva el mismo número de esta escritura.—Doy fé.—Y.—A. Haro, Jr.—Y.—Franco. L. Rodriguez.—El sello del Juzgado.—Lic. M. Mimiaga.—Rúbricas."

Diligencias y Documentos Protocolizados.

"Los tibres correspondientes en cada hoja debidamente cancelados.—Señor Juez de la. Ynstancia.—Próspero Sandoval, mayor de edad, banquero y de esta vecindad, ante Vd. ocurro con los respetos debidos á exponer:—que acompaño al presente un poder otorgado en el Extrangero por mi hermano Don Aurelio Sandoval y su esposa á me favor.—Exhibo así mismo la traducción respectiva de lo escrito en idioma inglés, para que despues de hecho el cotejo que corresponde con el original, se sirva Vd. mandar protocolizar el instrumento referido y estas diligencias en el oficio Notarial á su digno cargo.—Nombro como perito para el cotejo al Señor Luis M. Salazar.—Protesto lo necesario.—Nogales, Mayo veintitres de mil novecientos ocho.—P. Sandoval.—Rúbrica.—Un sello quedice:—"Juzgado de Primera Ynstancia. Nogales, Son. Mex."—Presentado en su fecha á las cuatro de la tarde con el poder y traducción á que se refiere. Nogales, Sonora, Mayo veintitres de mil novecientos ocho. Conste.—Rúbrica del Juez.—Nogales, Sonora, Mayo veintitres de mil novecientos ocho.—Por presentado el anterior escrito con el poder y traducción á que se refiere el ocursante. fórmese expendiente

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tómese razón y con fundamento de lo prevenido por el artículo 458 cuatro-cientoscincuenta y ocho del Código de Procedimientos Civiles, se nombra perito para que haga el cotejo de los documentos que obran en idioma inglés con la traducción correspondiente en castellano al Señor Luis M. Salazar, á quien se le hará saber su nombramiento y en caso de aceptación, disciernasele el cargo en debida forma, á fin de que, prévia la protesta de ley, diga si ratifica ó nó, la traducción exhibida con el original y hecho lo expuesto hágase la protocolización que se ha solicitado, para locual remitanse originales en

su oportunidad, estas diligencias á la Notaria Pública adscrita á este Juzgado, todo con citación y audiencia del Ciudadano Agente del Ministerio Público. Así lo proveyo y firmó el Ciudadano Licenciado Maclovio Mimiaga, Juez de Primera Ynstancia de este Partido Judicial. Damos fé.—M. Mimiaga.—A.—A. Haro Jr.—Rúbricas.—A.—F. E. Martinez.—Firmado.—En la misma fecha se tomó razón y se formó expediente como está mandado en el auto que antecede. Conste.—Rúbrica del Juez.—En seguida notificado el C. Agente del Ministerio Público firmó. Damos fé.—M. Mimiaga.—José M. Encinas.—A.—A. Haro Jr.—Rúbricas. A.—F. E. Martinez.—Firmado.—En la misma fecha se publicó por lista el auto anterior.

Conste.—Rúbrica del Juez.—En seguida presente en el local
149 de este Juzgado el Señor Luis M. Salazar y enterado del nombramiento de perito que ha recaido en su
(Court Seal.) persona, dijo: que acepta dicho nombramiento y
I. Cotejado. en consecuencia protesta su fiel y legal desempeño, por lo que, el subscrito Juez le hizo el discernimiento respectivo firmando para constancia. Damos fé.—M. Mimiaga.—L. M. Salazar.—Firmado.—A.—A. Haro Jr.—Rúbricas.—A.—F. E. Martinez.—Firmado.—Acto contímuo notificado el Señor Don Próspero Sandoval, dijo: que es conforme con la resolución anterior y firmó con el subscrito Juez. Damos fé.—M. Mimiaga.—P.—Sandoval.—A.—A. Haro Jr.—Rúbricas.—A.—F. E. Martinez. Firmado.—En veinticinco del mismo mes y año compareció el Señor Luis M. Salazar, fur protestado en forma para procudicirse con verdad en la presente diligencia y á sus generales dijo: asi llamarse ser orifinario de Guaymas, de veintidos años de edad, casado, empleado particular y de esta vecindad. Púestole á la vista el documento original redactado en idioma inglés y traducción respectiva en castellano exhibidos por el interesado, expuso: que ha examinado cuidadosamente el documento original asi como la traducción correspondiente y ha encontrado ésta fielmente tomada de anquel por lo que, la ratifica en todas sus partes y la hace suya, firmando para constancia con el Ciudadano Juez y Agente del Ministerio Público que estuvo presente en esta diligencia. Damos fé.—M.
150 Mimiaga.—Rúbrica.—L. M. Salazar.—Firmado.—A.—A. Haro Jr.—Rúbrica.—A.—F. E. Martinez.—Firmado.—En la misma fecha y estando terminadas estas diligencias, se pasan originales en ocho fojas útiles, para los efectos de su protocolización á la Notaria Pública adscrita á este Juzgado. Conste.—Rúbrica del Juez.—

"El Poder á Que se Refieren Las Anteriores Diligencias Dice a la Letra:—"en la Ciudad de Los Angeles, Estado do California á los veintodos dias del mes de Abril de mil novecientos ocho, ante mí el Lic. Antonio Orfila, Notario público en ejercicio y los testigos que al fin se expresarán, compareció el Señor Aurelio Sandoval, banquero y Luisa Parodi de Sandoval, su esposa, mayores de edad, y de esta vecindad, á quienes doy fé conocer personalmente, así como de su capacidad legal para obligarse y dijeron: que mereciendole toda su confianza Señor Próspero Sandoval, en la Villa de Nogales, Estado de Sonora, Mexico, por el presente instrumento y enla via y forma

que más haya lugar en derecho, le confieren todo su poder, ámplio, cumplido y bastante cuanto en derecho se requiera y sea necesario, para que en nombre y representación de los otogantes, administre los bienes que posee y adquiera en lo sucesivo, para que recaude sus rentas y practique todas las demás gestiones de un celoso y entendido administrador. Para que arriende dichos bienes, por el
151 tiempo, el precio y las condiciones que estime convenientes y deshaucie á los inquilinos y colones, cuando proceda. Para que cobre cuantas cantidades correspondan á los otorgantes, sean en metálico, frutos, géneros y efectos de la deuda pública y demás procedentes de cualquier contrato que haya celebrado con la Nación, Estados, Corporaciones ó particulares, dando los correspondientes recibos, cartas de pago y finiquitos, y cancelando las hipotecas y embargos á que estuvieren sujetos los bienes de sus deudores, ó de los fiadores de estos. Para que pague las deudas, todas las cargas y contribuciones á que se hallen afectos los bienes de los otorgantes. Para que tome cuentas á todos los que tengan obligación de rendirlas á los otorgantes por cualquier titulo y las examine, apruebe, tache ú objecione, satisfaga el alcance, si resultare, y otorgue los finiquitos y demás resguardos procedentes. Para que transija todos los créditos, las acciones y los derechos, activos y pasivos que tengan los otorgantes ó en lo de adelante tuvieren, otorgando las escrituras con las clausulas de su naturaleza. Para que cuando lo crea conveniente someta todos los asuntos y su decisión al juicio de arbitros juris, ó de amigables componedores, tercero en discordia y demás que deban sustituirlos, comprometiendose á estar y pasar por el laudo que se pronuncia, bajo la pena pecuniaria, que conceptúe prudente. Para que otorgue esperas ó quitas á los acreedores. Para que aista á toda

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clase de juntas que con cualquier motive se celebren, emitiendo su voto como le pareciere. Para que en pago de deudas admita toda clase de bienes muebles, inmuebles ó semovientes. Para que redima los censos que paguen ó cobren los otorgantes,
(Court Seal.) como censualistas ó como censatarios, otorgando
I. Cotejado. las correspondientes escrituras. Para que acepte simplemente, ó con beneficio de inventario todas las herencias testadas ó intestadas que correspondan á los otorgantes, nombrando depositarios, peritos y contadores, apreube los inventarios, las tasaciones y las divisiones, tomando posesión de los bienes que seles adjudiquen y otorgando las correspondientes escrituras. Para que venda absolutamente ó con pacto permitido por las leyes, las fincas rústicas ó urbanas que posean en la actualidad ó en lo sucesivo adquieran los otorgantes, por el precio que estime más ventajoso, que cobrará al contado ó á plazos y con las condiciones que estime, declarando las cargas ó los gravámenes de los inmuebles, á cuya evicción y cuyo saneamiento le obligue con arreglo á derecho y si llegase el caso de redimir las fincas enagenadas con pacto, las retraiga, satisfaciendo el precio. Para que permute cualquiera finca de los otorgantes por otra de igual ó distinta naturaleza, por el

precio que estipule y cobrando ó abonando la diferencia de
153 valores. Para que en pública subasta ó privadamente, compre los prédios rústicos ó urbanos que creyere conveniente para los otorgantes, por el precio que estime, pagaderos al contado ó á plazos. Para que dé ó tome á préstamo cualquier cantidad en numerario, ó en cosas fungibles, con el interés el tiempo y las condiciones que acordare, firmando letras, pagarés documentos privados, y otorgando escrituras públicas de censo consignativo, ó de cualquiera otra naturaleza, con hipoteca de inmueble ó prenda, que entregará ó recibirá según los casos. Para que pida el apeo ó deslinde de las fincas de los otorgantes, promoviendo y siguiendo los correspondientes juicios. Para que tome la posesión corporal ó simbólica, de los bienes que por cualquier título adquieran los otorgantes, promoviendo si necesario fuere, los expedientes administrativos ó judiciales que correspondan. Para que á la seguridad de los contratos que otorgue en virtud de las facultades que se le confieren en el presente mandato, hipoteque cualquiera inmuebles, ó derechos reales de los otorgantes. Para que en los contratos que celebre y las obligaciones que contraiga las consigne en escrituras públicas que contengan los requistos y las clausulas propias de su naturaleza, si lo estimare conveniente. Para que comparezca ante los Jueces competentes, en actos conciliatorios y en juicios verbales, deduciendo las demandas que procedan y oponiendo las excepciones correspondientes.
154 Para que, los represente en todos los negocios Civiles ó criminales que al presente tengan ó en lo de adelante tuvieren, á cuyo efecto comprezca ante los tribunales competentes y en éllos ponga las demandas y contestaciones, presente escritos, testigos y documentos y produzca toda especie de pruebas, tache y objecione las de el contrario, articule y absuelva posiciones, forme articulos y se desista de éllos, pida requerimientos, citaciones y emplazamientos, secuestros, embargos y desembargos de bienes y su adjudicación, recuse á los funcionarios públicos, que por derecho sean recusables, aiga autos, decretos y sentencias definitivas, que consienta y de lo adverso apele y suplique é interponga cuando procedan los recursos extraordinarios de casación, responsabilidad y amparo de garantias y se desista de éllas, siguiendo los pleitos entodas sus instancias hasta su terminación, pues alefecto le confieren su poder más ámplio sin limitación alguna; el que podrá substituir en todo ó en parte á favor de quien le pareciere, revocar substituciones y nombrar otros nuevos, y pudiendo conferir á los substitutos la facultad de substituir á su vez; prometiendo tener por firme y válido cuanto en virtud de este mandato ejecuten el apoderado y los substitutos. Yó el abajo firmado Notario Público en ejercicio, dehidamente comisionado y juramentado en y para el Estado de California, Con-

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dado de Los Angeles, hago constar que el presente poder general estorgado conforme á las leyes de dicho Estado, de tal manera que el poder general surtiria todos sus efectos en el Territorio del Es-

tado de California y en el de cualquier otro Estado de la Unión y de Mexico, para el efecto que se proponen los otorgantes. Leído que fué todo este instrumento, dijeron los otorgantes estar conformes con su contendido y firmaron ante los testigos Señores Julio A. Bouchet y Adrian Davoust mayores de edad, vecinos y presentes.—Aurelio Sandoval.—Rúbrica.—Luisa P. de Sandoval.—Firmado.—y.—J. A. Bouchet.—Adrian Davoust. Firmados.—Ante mí.—Antonio Orfila.—Notario Público de el Estado de California en el Condado de Los Angeles.—Firmado.—Un sello rojo realzado que dice:—"Antonio Orfila Natario Público. Los Angeles, Co. Cal."—Traduccion.—Estado de California.—Condado de Los Angeles.—Yó, C. G. Keyes, Secretario del Condado de Los Angeles, Estado de California y Secretario Ex-oficio de la Corte Superior del mismo, (cuya corte es de Registro y tiene su sello), por el presente Certifico: que Antonio Orfila cuyo nombre está suscrito en el poder general anexo, era en el tiempo en que se firmó el mismo un Notario Público en y por el dicho Condado debidamente calificado y autorizado por lay para ejecutar dicho instrumento y plena fé y crédito son debidos á sus actos oficiales como tales. Y yó además certifico que estoy familiarizado con la escritura de dicho funcionario y verdederamente creo que la firma de dicho instrumento es genuina.—En testimonio de lo cual pongo aquí mi mano y fiho el sello de dicha Corte Superior en mi Oficina en el dicho Condado, este dia primero de Mayo del año del Señor de mil novecientos ocho.—C. G. Keyes, Secretario del Condado y Secretario Ex-oficio de la Corte Superior.—Por. R. Loudenslager.—Secretario Diputado.—Un sello que dice:—"Corte Superior del Condado de Los Angeles.—California.—L. M. Salazar.—Firmado.—Traductor.—Un sello que dice:—"Consulado de los Estados Unidos Mexicanos. Los Angeles, California."—Consulado de Los Estados Unidos Mexicanos en Los Angeles, Cal.—El que suscribe Certifica: que el Señor R. Loudenslager, es, como se titula Deputy County Clerk, en el Condado de los Angeles, Estado de California, Estados Unidos de América y que es suya la firma que aparece en la certificación que precede.—Los Angeles, Cal., 2 de Mayo de 1908.—Ant. Lozano.—Cónsul de Mexico.—Rúbrica.—Un sello rojo realzado que dice:—"Consulado de los Estados Unidos Mexicanos. Los Angeles, Cal." Al márgen.—No. 231.—Derechos $8.00.—Fees $3.99 U. S. Coin.—Un timbre por valor de cincuenta centavos debidamente cancelado.—Núm. 4061.—El infrascrito Subsecretario de Relaciones Exteriores, Certifica: que el Señor Antonio Lazano, es Cónsul de Mexico en Los Angeles, Cal. y suya la firma que antecede.—Mexico, Mayo diez y seis de mil novecientos ocho.—F. Gamboa.—Rúbrica."

(Court Seal.) I. Cotejado.

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"Un sello que dice:—"Juzgado de Primera Ynstancia. Nogales, Son., Mex."—C. Administrador Principal del Timbre, Presente.—Participo á Vd. que con esta fecha y bajo el número 112, se otorgó ante mí, una escritura, por la cual, se protocolizó á solicitud del Señor Don Próspero Sandoval, el poder conferido á su favor en la

Ciudad de Los Angeles, California, Estados Unidos del Norte, con fecha veintidos de Abril del corriente año, por el Señor Aurelio Sandoval y su esposa Luisa Parodi de Sandoval. Esta escritura ocupo dos fojas del protocolo, conteniendo dos el documento original, por lo que, de acuerdo con la fracción 78 inciso II de la Tarifa de la ley del Timbre vigente, causa un impuesto de diaz y—seis pesos.—Libertad y Constitución.—Nogales, Sonora, Mayo 26 de 1908.—M. Mimiaga.—Rúbrica."

"Al márgen timbres por valor de diez y seis pesos debidamente cancelados.—Un sello que dice:—"Admon. Pral. del Timbre, Nogales."—El subscrito Administrador Principal del Timbre, Certifica: que hoy se adhirieron y cancelaron en esta note, timbres por valor de diez y seis pesos conforme á la anterior liquidación formada bajo la responsabilidad del Notario que la subscribe.—Nogales, Sonora, Mayo 26 de 1908.—F. A. Flores.—Rúbrica."

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Se Saco de su matriz este primer testimonio el mismo dis del otorgamiento de la escritura. Vá en cinco fojas útiles debidamente cotejadas con los timbres de ley, habiendo quedado protocolizada la preinserta nota del Timbre y las diligencias y documentos transcritos, en legajo que lleva el mismo número de este instrumento y agregadas al apéndice respectivo; y lo autoriza el subscrito Juez en funciones de Notario Público, á solicitud y para uso del Señor Don Próspero Sandoval, en Nogales, Sonora, á los veintiseis dias del mes de Mayo de mil novecientos ocho. Doy Fe.—T y.—de.—No Vale.—E. R.—ante.—á.—Vale.—

[COURT SEAL.] LIC. M. MIMIAGA.

Derechos devengados.—$19.00.

(Court Seal.) I. Cotejado.

159 CONSULATE OF THE UNITED STATES OF AMERICA,
Nogales, Sonora, Mexico, ss:

I, Samuel T. Lee, Consul of the United States of America at Nogales, Sonora, Mexico, do hereby certify and make known to whom those presents shall come that Lic. M. Mimiaga, whose signature is subscribed to the certificate hereto annexed, is Judge of the Court of First Instance at Nogales, Sonora, Mexico; that at the time of the execution of the annexed document he was the duly and lawfully commissioned Judge of the said Court invested with full notarial powers; and that he had legal authority to execute the annexed certificate.

And I do further certify that the aforementioned signature of Lic. M. Mimiaga and the seal of the Court of First Instance at Nogales, Sonora, Mexico, ("Juzgado de Primera Instancia, Nogales, Son., Mex."), are genuine and entitled to full faith and credit.

Given under my hand and official seal this Twelfth day of July,

A. D. 1908, and of the Independence of the United States of America, the One Hundred Thirty Third.

[SEAL.]

SAMUEL T. LEE,
Consul of the United States of America
at Nogales, Sonora, Mexico.

(American Consular Service $2. Fee Stamp, canceled.)
Consular Fee $2.00 United States Currency Paid by Affixing Official Stamp to the Original Copy of this Document.

160 (Endorsed:) No. 1028. In the Supreme Court of the Territory of Arizona. A. Sandoval et al. vs. Epes Randolph. Filed July 15, 1908. F. A. Tritle, Jr., Clerk.

161 In the Supreme Court of the United States.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
EPES RANDOLPH, Appellee.

Know all men by these presents, that we, A. Sandoval and P. Sandoval as principals, and Edward Titcomb, of the city of Nogales, Arizona, and Frederick Ronstadt and Rosario Brena, both of the city of Tucson, Arizona, as sureties, are held and firmly bound unto Epes Randolph in the full and just sum of Twenty Thousand (20,000.00) Dollars to be paid to the said Epes Randolph, his attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators jointly and severally, firmly by these presents, sealed with our seals and dated this 8th day of July in the year of our Lord One Thousand Nine Hundred and Eight.

Whereas, lately at a session of the Supreme Court of the Territory of Arizona, in an action in said Court then and there pending between Epes Randolph as plaintiff therein, and A. Sandoval and P. Sandoval as defendants therein, a judgment was rendered and entered in said Supreme Court of the Territory of Arizona,
162 affirming a certain judgment of the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Santa Cruz, which said judgment of said District Court was made and entered on the tenth day of April, A. D. 1907, in favor said Appellee, Epes Randolph, wherein and whereby it was ordered, adjudged and decreed that said Appellee Epes Randolph, recover of said Appellants, A. Sandoval and P. Sandoval, and each of them, the sum of Ten Thousand Five Hundred and Twenty-eight Dollars and Thirty-three cents (10,528.33); and together with interest thereon at the rate of six per cent. per annum from the 10th day of April, A. D. 1907, and the cost of said action; and

Whereas, the said appellants, A. Sandoval and P. Sandoval have obtained an allowance of an appeal to the Supreme Court of the United States and a stay of the said judgment of the Supreme Court of the Territory of Arizona, and of the said judgment of the District

Court of the Second Judicial District of the Territory of Arizona in and for the County of Santa Cruz, in said cause by order of the Honorable John H. Campbell, Justice of the Supreme Court of the Territory of Arizona, upon Appellants filing herein a bond in the sum of Twenty Thousand (20,000) Dollars as and for a cost and supersedeas bond in said cause; and whereas a citation directed to the said Epes Randolph is about to be issued, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at the City of Washington in the District of Columbia.

163 Now the condition of the above obligation is such that, if the said A. Sandoval and P. Sandoval shall prosecute their said appeal to effect, and shall answer all costs, judgment and damages, if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force.

P. SANDOVAL. [SEAL.]
A. SANDOVAL, [SEAL.]
By P. SANDOVAL, *His Attorney in Fact.*
FREDERICK RONSTADT. [SEAL.]
ROSARIO BRENA. [SEAL.]
EDWARD TITCOMB. [SEAL.]

TERRITORY OF ARIZONA,
County of Pima, ss:

Frederick Ronstadt and Rosario Brena, sureties upon the within bond on appeal, being first duly sworn, each for himself and not one for the other, deposes and says that he is a resident and freeholder of the Territory of Arizona and that he is worth the sum of Twenty Thousand Dollars in property subject to execution within said Territory of Arizona and not exempt under the laws of said Territory, and that he is worth the said amount over and above all his just debts and liabilities.

FREDERICK RONSTADT.
ROSARIO BRENA.

Subscribed and sworn to this 8th day of July, 1898.
(My commission expires Apr. 25, 1911.)
[SEAL.] BESSIE McINERNAY,
Notary Public.

164 TERRITORY OF ARIZONA,
Santa Cruz County, ss:

Edward Titcomb, surety upon the within bond on appeal, being first duly sworn, deposes and says, that he is a resident and freeholder of the Territory of Arizona and that he is worth the sum of Ten Thousand Dollars in property subject to execution within said Territory of Arizona and not exempt under the laws of said Territory, and that he is worth the said amount over and above all his just debts and liabilities.

EDWARD TITCOMB.

Subscribed and sworn to this 10th day of July, 1908.
(My commission expires May 27, 1912.)
[SEAL.] GEORGE E. TRALLES,
Notary Public.

The within bond approved by me this 14th day of July, 1908.
JOHN H. CAMPBELL,
Associate Justice Supreme Court of Arizona.

(Endorsed:) No. 1028. In the Supreme Court of the Territory of Arizona. A. Sandoval, et al. vs. Epes Randolph. Cost and Supersedeas bond. Filed July 15, 1908. F. A. Tritle, Jr., Clerk.

165 In the Supreme Court of the Territory of Arizona.

Be it remembered that heretofore and on to-wit the 14th day of January, A. D., 1908, the same being one of the regular juridical days of the January Term, A. D., 1908, of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 1028.

A. SANDOVAL et al., Appellants,
vs.
EPES RANDOLPH, Appellee.

At this day, it is ordered by the Court that the hearing of this cause be set for January 23, 1908.

And afterwards and upon to-wit the 23rd day of January A. D., 1908, the same being one of the regular juridical days of the January Term A. D., 1908, of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 1028.

A. SANDOVAL et al., Appellants,
vs.
EPES RANDOLPH, Appellee.

166 At this day, upon motion of Mr. A. Orfila, it is ordered that Mr. Henry S. Van Dyke be entered as of counsel for Appellants herein.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 1028.

A. SANDOVAL et al., Appellants,
vs.
EPES RANDOLPH, Appellee.

At this day, upon motion of Mr. A. Orfila attorney for Appellants herein, it is ordered that he be granted ten days from January 24, 1908, in which to file reply brief, with leave to Mr. E. S. Ives, attorney for Appellee to file answer to Appellants' reply brief if he so desires.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 1028.

A. SANDOVAL et al., Appellants,
vs.
EPES RANDOLPH, Appellee.

167 This cause coming on at this time for hearing, was argued by Mr. E. S. Ives for Appellee, and cause ordered submitted.

And afterwards and upon to-wit the 27th day of March A. D., 1908, the same being one of the regular juridical days of the January Term A. D., 1908, of said Court, the following order and judgment, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 1028.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
EPES RANDOLPH, Appellee.

This cause having been heretofore submitted, and by the Court taken under advisement and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court be and the same is hereby, affirmed.

It is further ordered, adjudged and decreed that the Appellee herein do have and recover of and from A. Sandoval and P. Sandoval, Appellants herein, and United States Fidelity and Guaranty Company of Baltimore, Maryland, surety on Supersedeas Bond the sum of ten thousand five hundred twenty-eight and 33/100
168 ($10,528.33) Dollars with interest thereon at the rate of six per cent. (6%) per annum from April 12, 1907, until paid.

It is further ordered, adjudged and decreed that the Appellee herein do have and recover of and from the Appellants herein, A.

Sandoval and P. Sandoval, and Anton Proto and Wm. Schuckmann, sureties on Cost Bond herein, his costs in this court taxed at thirty-seven and 10/100 ($37.10) dollars, together with his costs in the court below in this cause incurred.

And afterwards and upon to-wit the 18th day of May, A. D. 1908, the same being one of the regular juridical days of the January Term A. D. 1908, of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 1028.

A. SANDOVAL et al., Appellants,
vs.
EPES RANDOLPH, Appellee.

It is ordered that the Motion for Re-hearing filed herein by Appellants, be submitted.

And afterwards and upon to-wit the 19th day of May A. D. 1908, the same being one of the regular juridical days of the January Term A. D., 1908, of said Court, the following order, inter
169 alia, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 1028.

A. SANDOVAL et al., Appellants,
vs.
EPES RANDOLPH, Appellee.

It is ordered that the Motion for Re-hearing filed herein by Appellants, and heretofore submitted, be, and the same is hereby, denied.

And afterwards and upon to-wit the 12th day of November A. D., 1908, the same being one of the regular juridical days of the January Term A. D., 1908, of said Court, the following order inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 1028.

A. SANDOVAL et al., Appellants,
vs.
EPES RANDOLPH, Appellee.

At this day comes Frank H. Lyman for Appellants and moves the Court for an order requiring the Clerk of the District Court of

the Second Judicial District of the Territory of Arizona in and for the County of Santa Cruz, to transmit to the Clerk of this
170 Court the record heretofore before this Court in this cause for the purpose of preparing the Record on Appeal to the Supreme Court of the United States.

It is ordered by the Court that said motion be and the same is hereby denied.

171 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify that the foregoing pages numbered from 1 to 127, inclusive, contain a full, true, and correct copy of the Abstract of Record filed in this office on the 29th day of November, 1907, in case No. 1028, A. Sandoval and P. Sandoval, Appellants, vs. Epes Randolph, Appellee.

And I further certify that pages numbered 128 to 170 both inclusive, contain a full true and correct copy of the Opinion; Petition for Re-hearing; Allowance of Appeal; Testimony of A. Sandoval, et al., before the Judge of the Court of First Instance at Nogales, Sonora, Mexico; Supersedeas Bond; and all orders and proceedings of said Supreme Court had and entered of record in said cause, as the same remain on file and of record in my office.

Also that the Citation attached hereto in the original Citation issued by the said Supreme Court of the Territory of Arizona.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the said Supreme Court, at Phœnix, Arizona, this — day of December, 1908.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,
Clerk Supreme Court of Arizona.

172 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Epes Randolph and to his Attorney, Eugene S. Ives, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington within sixty days hereof pursuant to an order allowing an appeal entered in the Clerk's office of the Supreme Court of the Territory of Arizona, in that certain action Numbered —, wherein A. Sandoval and P. Sandoval are appellants and Epes Randolph is appellee, to show cause, if any there be, why the decree entered against the said appellants, as in said order allowing an appeal mentioned, should not be cor-

rected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 18th day of July, A. D. 1908.

JOHN H. CAMPBELL,
Justice of the Supreme Court of the Territory of Arizona.

173 *United States Marshal's Return.*

UNITED STATES OF AMERICA,
District of Arizona, ss:

I hereby certify that I served the within citation on Epes Randolph, appellee, on the 31st day of July 1908, at the city of Tucson, County of Pima, in the Territory of Arizona, by then and there delivering to the said Epes Randolph, appellee, personally, a true copy of the within citation.

And I further certify that I served the within citation on the within named E. S. Ives, attorney for appellee, on the 22d day of July 1908, at the city of Tucson, and County of Pima, Territory of Arizona, by then and there delivering to S. V. McClure, personally, a true copy of the within citation; the said S. V. McClure being the Chief Clerk in the office of the above named E. S. Ives, service upon the said S. V. McClure in the absence of E. S. Ives, being directed by F. H. Lyman, one of the attorneys for appellant-.

Dated at Tucson, in the Territory of Arizona, this 31st day of July, 1908.

B. F. DANIELS,
U. S. Marshal,
By H. D. GUERRY, *Deputy.*

Marshal's Fees.

Two citations $8.00

174 [Endorsed:] Marshal's D'ket No. 183. No. 1028. In the Supreme Court of the United States. A. Sandoval & P. Sandoval, Appellants, vs. Epes Randolph, Appellee. Citation. Filed August 4, 1908. F. A. Tritle, Jr., Clerk.

175 In the Supreme Court of the United States.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
EPES RANDOLPH, Appellee.

Order Enlarging Time to File Record.

Now on this day on motion of the appellants by A. Orfila, of counsel, for the extension of the time in which to file the transcript

herein in the United States Supreme Court, it is ordered that the time heretofore granted in which to file said transcript in said Supreme Court of the United States be and the same is hereby extended to December 15th, 1908, and that the return day specified in the citation heretofore issued herein be extendd to Dec. 15, 1908.

Dated this 8th day of September, 1908.

JOHN H. CAMPBELL,
Justice of the Supreme Court of the Territory of Arizona.

176 [Endorsed:] No. 1028. In the Supreme Court of the Territory of Arizona. A. Sandoval, et al., vs. Epes Randolph. Order Enlarging Time to file Record. Service of a copy of within admitted this 8 day of Sept. 1908. Eugene S. Ives, Att'y for Appellee. Filed Sept. 10, 1908. F. A. Tritle, Jr., Clerk, By Angie B. Parker, Deputy.

177 In the Supreme Court of the United States.

No. 114.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
EPES RANDOLPH, Appellee.

Stipulation.

It is hereby stipulated between the parties hereto as follows:

Whereas, there appears to be incorporated in the record in the above entitled action a certain document in the Spanish language, and the record does not contain a translation of such document,

Now, therefore, the parties hereto stipulate and agree that the Clerk of the above named court may procure a translation of the said document to be made by some person selected by himself in the City of Washington, and that such translation so procured to be made by the said Clerk shall be admitted and deemed to be a true translation of the said Spanish document in the transcript, and that such translation be made a part of the record, and be printed as such by the Clerk without further notice to the parties hereto.

It is Further Stipulated that the cost of such translation shall be added to and form a part of the cost of printing the record, and be so deemed by the parties hereto.

Dated November 12, 1910.

LAWLER, ALLEN, VAN DYKE & JUTTEN,
G. BALLARD,
HENRY S. VAN DYKE,
Attorneys for Appellants.
EUGENE S. IVES,
Attorney for Appellee.

[Endorsed:] 114/21443.

178 [Endorsed:] File No. 21,443. Supreme Court U. S. October Term, 1910. Term No. 114. A. Sandoval and P. Sandoval, Appellants, vs. Epes Randolph. Stipulation as to translation of Spanish document forming part of transcript of record. Filed November 26, 1910.

179 Office of the Notary Public Assigned to the Court of First Instance.

First certification of public document No. 112 of record in the proceedings of voluntary jurisdiction, and annexed documents relating to the power of attorney given by Señor Aurelio Sandoval and wife, Señora Luisa Parodi de Sandoval, at the City of Los Angeles, California, in favor of Senor Próspero Sandoval, a resident of this town.

Nogales, Sonora, May 26, 1908.

[Seal of the Court.]

180 (Court Seal—1 Peso Stamp.)

Number One Hundred and Twelve.—In the Town of Nogales, Sonora, on the twenty-sixth of May, nineteen hundred and eight, I, the Licenciate Maclovio Mimiaga, Judge of First Instance, acting as Notary Public, before the attesting witnesses, Antonio Haro, Jr., and Francisco Lino Rodriguez, both of full age and employed in this vicinity—the first named being unmarried, domiciled at No. 9 Arizpe street, and the second being married, and residing at No. 29 Camou street—certify that I have before me eight legal size sheets in the proceedings of voluntary jurisdiction, and annexed documents, instituted in the Court before the undersigned Notary by Señor Próspero Sandoval, who asks for an order for the recording of the power of attorney which under date of the twenty-second of April of the present year, was executed in his favor by Señor Aurelio Sandoval and wife, the Señora Luisa Parodi de Sandoval, in the City of Los Angeles, State of California, United States of North America, before the Licenciate Antonio Orfila, Notary Public, whose signature appears to be legalized by C. G. Keyes, County Clerk of Los Angeles, and ex-officio Clerk of the Superior Court of that County, R. Loudenslager, Deputy Clerk, having signed the certificate in place of that officer, and the signature of the Deputy Clerk having been legalized by the signature of the Mexican Consul at that place, Señor Antonio Lozano, and the signature of the letter by that of the Mexican Subsecretary of Foreign Relations, Señor F. Gamboa, on the sixteenth day of the current month and year. In the proceedings referred to there appears an order of which the following is a literal copy:—"Nogales, Sonora, 'May twenty-third, nineteen hundred and eight.—The foregoing 'document having been exhibited, along with the power of attorney 'and translation, to the petitioner, let a file be opened for the

Sgd. J. Cotejado.

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Doc. No. 912. July 10, 1908. (Court Seal.)

" papers in the case, let the record be made, and " in accordance with the provisions of article " four hundred and fifty-eight (458) of the Code " of Civil Procedure, let Señor Luis M. Salazar " be appointed as the expert to compare the docu- " ments which are written in the English language with the corres- " ponding translation into Spanish; let Señor Salazar be notified " of his appointment, and, in the event that he accepts, let him be " instructed in due form as to his duties, to the end that, having " been advised of the requirements of the law, he may say whether " or not he ratifies the translation produced with the original, and, " this done, you will make the protocolization (record) as requested " for which purpose let the originals in these proceedings be remitted " in due course to the office of the Notary Public assigned to this " Court, all of which, with citation and with hearing before the Citi- " zen Agent of the Public Minister. Thus the Citizen Licenciate, Mac " lovio Mimiaga, Judge of First Instance of this Judicial District, " has decided and subscribed. We certify.—M. Mimiaga.—A.— " A. Haro, Jr. Flourishes.—A.—F. E. Martinez.—Signed."—Likewise I, the Notary, certify that, in compliance with the foregoing order, I protocolize in the present act the proceedings and

182 documents annexed, attaching the same to the appendix to the record in the file bearing the same number as the present writing. I certify.—Y.—A. Haro, Jr.—Y.—Franco L. Rodriguez.—The Seal of the Court. Licenciate M. Mimiaga.—Flourishes.

Proceedings and Documents Protocolized.

The appropriate stamps on each sheet duly cancelled.—To the Judge of First Instance:—Próspero Sandoval, of full age, banker and residing in this vicinity, with due respect appears before you and sets forth: That these presents are accompanied by a power of attorney executed in my favor, in foreign parts, by my brother, Don Aurelio Sandoval and his wife.—I exhibit likewise the corresponding translation of what is written in the English language in order that, after comparing said translation with the original, you will be pleased to order that the instrument referred to, together with these proceedings, be protocolized in the notarial office under your honored charge.—I name Señor Luis M. Salazar as the expert to make such comparison.—I declare as required.—Nogales, Sonora, Mexico, May 23, 1908.—P. Sandoval.—Flourish.—A Seal which bears the following:—"Court of First Instance. Nogales, Son. Mex."—Presented on its date at 4 o'clock in the afternoon with the power of attorney and translation referred to.—Nogales, Sonora, May 23, 1908.—Attest.—Flourish of the Judge.—Nogales, Sonora, May twenty-third, nineteen hundred and eight.—The foregoing document having been ex-

183 (Court Seal—1 Peso Stamp.)

hibited, along with the power of attorney and translation, to the petitioner, let a file be opened for the papers in the case, let a record be

made, and, in accordance with the provisions of Article four hundred and fifty-eight (458) of the Code of Civil Procedure, let Señor Luis M. Salazar be appointed the expert to compare the documents written in the English language with the corresponding Spanish translation. You will notify Señor Salazar of his appointment, and, in case of his acceptance, let him be instructed in due form as to his duties, to the end that, advised of the requirements of the law, he may say whether or not he ratifies the translation produced with the original, and, this done, let the protocolization be made as requested, for which purpose transmit the originals in these proceedings in due course to the Notary Public assigned to this Court, all of which, with citation and hearing before the Citizen Agent of the Public Ministry. Thus the Citizen Licenciate, Maclovio Mimiaga, Judge of First Instance of this Judicial District, has decided and subscribed. We certify.—M. Mimiaga.—A.—A. Haro, Jr.—Flourishes.—A.—F. E. Martínez.—Signed.—On the same date the record was made and a file opened for the papers in the case as ordered in the preceding act. Attest.—Flourish of the Judge.—The Citizen Agent of the Public Ministry having at once been notified, signed. We certify.—
M. Mimiaga.—José M. Encinas.—A.—A. Haro, Jr.—Flour-
184 ishes.—A.—F. E. Martinez.—Signed.—On the same date
the foregoing order was docketed. Attest.—Flourish of the
Judge.—Whereupon Señor Luis M. Salazar ap-
(Court Seal.) peared before this Court, and, being informed of
his appointment as expert, stated that he accepted
J. Cotejado. said appointment and gave assurance of its faithful and legal fulfilment, upon which the undersigned Judge issued the appropriate certificate of appointment, signing the same to legalize it. We certify.—M. Mimiaga.—L. M. Salazar.—Signed.—A.—A. Haro Jr.—Flourishes.—A.—F. E. Martínez.—Signed.—Whereupon Señor Don Próspero Sandoval, having been notified, stated that he was agreeable to the foregoing act and signed together with the undersigned Judge. We certify.—M. Mimiaga.—P. Sandoval.—A.—A. Haro Jr.—Flourishes.—A.—F. E. Martínez. Signed.—On the twenty-fifth of the same month and year appeared Señor Luis M. Salazar, who declared in due form, setting forth truthfully, in general terms, the following: that he was a native of Guaymas, twenty-two years of age, married, employed by private parties and residing in this vicinity. The original document, drafted in the English language, and the corresponding translation produced by the party in interest having been placed before the said Salazar, he declared: that he has carefully examined the original document as well as the corresponding translation, which he has found to be faithfully made therefrom, wherefore he ratifies the same in its entirety and makes it his own, signing the same to legalize it along with the Citizen Judge and Agent of the Public
185 Ministry who was present at this proceeding. We certify.—
M. Mimiaga.—Flourish.—L. M. Salazar.—Signed.—A.—A. Haro Jr.—Flourish.—F. E. Martínez.—Signed.—On the same date, these proceedings having come to an end, the originals, in eight legal size sheets, pass on to the office of the Notary Public assigned

to this Court for the purpose of protocolization. Attest.—Flourish of the Judge.—

Following in a literal copy of the power of attorney referred to in the foregoing proceedings: "In the City of Los Angeles, State of California, on the twenty-second of April, nineteen hundred and eight, before me, the Licenciate Antonio Orfila, Notary Public in the active exercise of his office, and in the presence of the witnesses hereinafter named, appeared Señor Aurelio Sandoval, banker, and Señora Luisa Parodi de Sandoval, his wife, both of full age and residing in this vicinity, whom I certify that I know personally and whom I also certify to be possessed of the legal capacity to obligate themselves, and who deposed:—That, reposing their entire confidence in Señor Próspero Sandoval, of the Town of Nogales, State of Sonora, Mexico, they, by the present instrument, and in manner and form most approved by law, confer upon him their powers, full, ample and sufficient as may be requisite and necessary according to law, in the name and representation of the undersigned, to administer the property now possessed or which may be hereafter acquired, to collect rents and do and perform all other acts with an administrator's jealousness and prudence. To lease said property
186 for such terms and rentals and under such conditions as in his estimation may be most advantageous, and to dispossess lessees and tenant farmers when legal action is necessary. To collect such sums as may be due the undersigned, whether in cash, produce, merchandise or in securities representing public indebtedness or other obligations whatever based on contracts entered into with the Federal Government, the States, with corporations or private individuals, giving therefor the appropriate quittances, discharges and receipts, and cancelling the mortgages and embargo-s to which the goods or property of the debtors may be subject, or by which their sureties may be held. To pay all the debts, charges and contributions to which the property of the undersigned may be subject. To keep account of all those obligated to pay to the undersigned indebtedness, charges or contributions however the obligations may be expressed and to examine, approve, disapprove or object to the same; to satisfy any balance due, if any, and execute the necessary quittances and other vouchers. To compound and compromise all credits, actions and rights, assets and liabilities now or heretofore pertaining to the undersigned, and to execute instruments and writings in appropriate terms. When in the opinion of the attorney in fact it is advantageous or necessary, to submit all matters to the judgment of referees, or friendly arbitrators, to an umpire in the event of disagreement or to substitutes, agreeing to abide by the awards rendered under such pecuniary penalties as may be deemed

187 (Court Seal—1 Peso Stamp.)

prudent. To execute instruments of respite or quittance to creditors. To attend all broad meetings, conferences or gatherings (juntas) of whatever nature and for whatever purpose held, casting his vote therein as he may deem most expedient. To accept in payment of

Court Seal. J. Cotejado.

indebtedness all classes of property, moveable, immovable or self moving (real estate, personal property and live stock), To redeem or pay off censos (annuities) that may be payable or collectable by the undersigned, as annuitants (lessors) or as lessees (one who pays a censo or annuity out of his estate), executing the appropriate instruments. To accept simply, or with benefit of inventory, all inheritances, testate or intestate, belonging to the undersigned, naming the depositaries, appraisers and accountants or auditors; to approve the inventories, appraisements and divisions of property, taking possession of the property adjudicated to the undersigned and executing the appropriate instruments. To sell absolutely, or under agreements authorized by law, country or city real estate now in the possession of, or which may be hereafter acquired by, the undersigned, for such prices as our attorney in fact may deem best; to accept cash payments or payment by installments on such conditions as he may deem best, in the latter case fixing the incumbrance or mortgage on real estate; to obtain eviction or guarantees according to law, and in the event that it should become necessary to redeem such properties as have been alienated by contract, to retake possession, giving satisfaction for moneys paid. To ex-
188 change any of the real estate belonging to the undersigned for other real estate of the same or of a different nature, for such valuation as may be stipulated, collecting or making good any difference in values. To purchase at public auction or private sale farm land or city real estate as he may deem for the best interests of the undersigned, and at such prices as he may deem best, making payment therefor in cash or in installments. To make or accept loans of any sums of money or perishable goods, at such interest, for such terms and under such conditions as may be agreed upon, signing such bills, promissory notes and private documents, and executing public instruments by way of mortgage or of any other nature, encumbering or pledging real estate, delivered or received accordingly as the case may be. To require the survey or delimitation of the properties belonging to the undersigned, instituting and pursuing the appropriate legal proceedings. To take possession, physically or symbolically, of the goods or property which in any manner may be acquired by the undersigned, instituting, if the need arises, the appropriate administrative or judicial proceedings. By way of security under the contracts which he may execute by virtue of the powers conferred by the present power of attorney, to mortgage any of the real estate of the undersigned and pay all duties on transfers thereof. In entering into contracts and contracting obligations, to execute public instruments containing the legal requisites and the clauses appropriate to their nature, as he may deem most advantageous. To appear before competent judges in
189 municipal proceedings and in judicial hearings, making allegations in complaints according to law and setting up appropriate defences. To represent the undersigned in all matters civil and criminal in which they may now or hereafter be concerned, to

which end to appear before competent tribunals and submit thereto the appropriate complaints and defences; to present documents, witnesses and writings and introduce all manner of evidence; to oppose the pleadings, witnesses and evidence offered by the opposing parties: to question and cross-question witnesses; to file interrogatories or desist from so doing; to secure summonses, citations, postponements, sequestrations, embargoes, or the raising of embargoes, on property and to secure the adjudication thereof; to challenge public functionaries subject by law to such challenge; to hold hearings, accept court rulings and final decisions, to acquiesce or appeal from decisions, to interpose in extraordinary appellate proceedings in cassation or in matters involving the responsibility for or protection of guaranties, or to refrain from so doing, pursuing law suits throughout their entire course to a conclusion in each case—and to this end the most ample and unlimited power is hereby conferred, with full power also of substitution of these powers in whole or part as to our said attorney may seem most advisable, to revoke substitutions and make new ones, with the right to confer on substitutes, in their turn, the power of substitution, promising to ratify and confirm all that our attorney, or his substitutes may do or cause
190 to be done by virtue hereof. I, the undersigned Notary Public, in the full exercise of his powers, duly sworn and commissioned in and for the State of California, County of Los

(Court Seal—1 Peso Stamp.)

Angeles, certify that the present general power of attorney is executed in conformity with the laws of said State in such manner that said general power of attorney will be effective for all its purposes throughout the territory of the State of California and in any other State of the Union and in Mexico. This instrument having been read in its entirety by the grantors therein named, they have stated that they agree to and accept its contents and have signed the same before the witnesses Julio A. Bouchet and Adrian Davoust, of full age, of this vicinity and here present.—Aurelio Sandoval.—Flourish.—Luisa P. de Sandoval.—Signed.—Y.—J. A. Bouchet. Adrian Davoust.—Signed.—Before me.—Antonio Orfila.—Notary Public for the State of California in the County of Los Angeles.—Signed.—A red, embossed seal bearing the following: "Antonio Orfila Notary Public. Los Angeles Co., Cal."—Translation.—I, C. G. Keyes, County Clerk of Los Angeles County, State of California, and ex-officio Clerk of the Superior Court thereof (which court is a court of record and possesses a seal), by these presents certify: That Antonio Orfila, whose name is subscribed to the annexed general power of attorney, was at the time of the signature thereof a Notary Public in and for said County, duly qualified and authorized by law to execute said instrument, and full
191 faith and credit may be given to his official acts as such. And I further certify that I am familiar with the handwriting of said officer and in truth believe that the signature to said instru-

Court Seal. J. Cotejado.

ment is genuine.—In testimony whereof I set my hand and affix the seal of said Court at my office in said County, this first day of May in the Year of Our Lord nineteen hundred and eight.—C. G. Keyes, County Clerk and ex-officio Clerk of the Superior Court. By R. Loudenslager, Deputy Clerk.—A seal bearing the following: "Superior Court of the County of Los Angeles. California."—Consulate of the United States of Mexico at Los Angeles, Cal.—The undersigned certifies: That R. Loudenslager is, as he styles himself, Deputy County Clerk In the County of Los Angeles, State of California, United States of America and that the signature appearing on the foregoing certificate is his.—Los Angeles, Cal., May 2, 1908.—Ant. Lozano.—Consul of Mexico.—Flourish.—A red, embossed seal bearing the following: "Consulate of the United States of Mexico. Los Angeles, Cal." On the margin.—No. 231.—Tax—$8.00.—Fees—$3.99, U. S. Currency.—A stamp of the denomination of fifty cents, duly cancelled.—No. 4061.—The undersigned Subsecretary of Foreign Relations, cer-fies: That Señor Antonio Lozano, is the Consul of Mexico at Los Angeles, Cal., and that the foregoing is his signature.—Mexico, May sixteen, nineteen hundred and eight.—F. Gamboa.—Flourish.

A seal bearing the following: "Court of First Instance. Nogales, Son., Mex."—Citizen, the Principal Administrator of Stamps:
192 —"I have to inform you that on this day and under the number 112, there was executed before me an instrument by virtue of which there was protocolized, at the request of Señor Don Próspero Sandoval the power of attorney granted to him in the City of Los Angeles, California, United States of North America, on the 22nd of April, 1908, by Señor Aurelio Sandoval and Luisa Parodi de Sandoval, his wife. Said instrument covered two sheets of the registry, containing the original document, wherefore, in accordance with the section 78 of schedule II of the tariff in the Stamp Law now in force, a tax of sixteen pesos (Mexican dollars) is imposed.—Liberty and the Constitution.—Nogales, Sonora, May 26, 1908. M. Mimiaga.—Flourish."

On the margin stamps to the value of sixteen pesos, duly cancelled.—A seal bearing the following: "Admn. Prin. of Stamps. Nogales."—The undersigned Principal Administrator of Stamps, certifies: That this day there were affixed and cancelled on this paper, stamps to the value of sixteen pesos in conformity with the foregoing liquidation conducted under the responsibility of the Notary thereto subscribing. Nogales, Sonora, May 26, 1908.—F. A. Flores.—Flourish.

(Court Seal—1 Peso Stamp.)

The first exemplification was taken from the original instrument on the date of its execution. It comprises five legal size sheets, duly cut and bearing the legal stamps, there having been proto-
193 colized the above inserted memorandum as to stamps, and the proceedings and documents transcribed, in the file that bears the same number as the instrument, as appendices thereto; and

authority therefor is hereby given by the undersigned Judge acting as Notary Public, at the request and for the use of Señor Don Próspero Sandoval, at Nogales, Sonora, on the twenty-sixth of May, nineteen hundred and eight.—I certify.—The interlineations "T." and "de" are cancelled; "E. R.," "ante," "a" stand as written.

[COURT SEAL.] LIC. M. MIMIAGA.

Taxes paid—$19.00.

(Court Seal.)
J. Cotejado.

Endorsed on cover: File No. 21,443. Arizona Territory Supreme Court. Term No. 114. A. Sandoval and P. Sandoval, appellants, vs. Epes Randolph. Filed December 15th, 1908. File No. 21,443.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 4.

A. SANDOVAL AND P. SANDOVAL, APPELLANTS,

vs.

EPES RANDOLPH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLANTS.

G. BULLARD,
LAWLER, ALLEN, VAN DYKE & JUTTEN,
HENRY S. VAN DYKE,
Attorneys for Appellants.

FRANK P. FLINT,
HENRY S. VAN DYKE,
Of Counsel.

(21,443.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 4.

A. SANDOVAL AND P. SANDOVAL, APPELLANTS,

vs.

EPES RANDOLPH, RESPONDENT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLANTS.

To the Supreme Court of the United States and to the Honorable Judges thereof:

Appellants, by their attorneys and counsel, hereby respectfully submit the following brief on their behalf:

Appellants submit the following assignment of errors relied upon on this appeal:

ASSIGNMENT OF ERRORS.

1. There is a fatal variance between the complaint and the proof, and the court committed prejudicial error in not so holding.

2. There is a fatal variance between the proof and the findings of fact and conclusions of law, and the court committed prejudicial error in making said findings and conclusions.

3. There is a fatal variance between the proof and the judgment, and the court committed prejudicial error in not awarding judgment to the defendants (appellants).

4. The court committed prejudicial error in not granting defendants' motion for a nonsuit.

5. The court committed prejudicial error in making the following finding of fact, to-wit:

"VI. That prior to the commencement of this action the said Lindsay assigned to the plaintiff all of his interest in the claim against the defendants hereinbefore set forth, and that the plaintiff is now the sole owner of said claim;" and the court committed further prejudicial error in awarding judgment in conformity with said finding.

6. The court committed prejudicial error in not finding that any interest that said Lindsay may have had in any cause of action alleged or proved

in said action was not assignable in law, and committed further prejudicial error in not awarding judgment to defendant for any part of said cause of action claimed by plaintiff on the basis of said assignment.

7. The court committed prejudicial error in not granting defendants' motion for leave to amend their answer at the trial and thereby plead in defense the statute of limitations, to wit, the act of November 16, 1903, of Arizona.

8. The court committed prejudicial error in not making findings of fact and conclusions of law and awarding judgment all in favor of defendants by reason of the laches and estoppel of plaintiff.

9. The court committed prejudicial error in not making findings of fact and conclusions of law, and judgment in accordance therewith, all in favor of defendants, on the ground that no proof was offered or introduced tending to support any judgment for damages against defendants.

10. There was a total failure of proof to support the findings and judgment, and the court committed prejudicial error in not making findings and judgment for defendants on said ground.

11. The court committed prejudicial error in denying defendants' motion for a new trial.

All of the foregoing assignments of error are intended to apply to the proceedings of the trial or

District Court of Arizona, as well as to the action of the Supreme Court of Arizona, in affirming said proceedings by its judgment rendered on appeal.

12. The Supreme Court of Arizona committed prejudicial error in affirming all of said proceedings of the trial or district court as aforesaid, and in affirming and giving judgment for respondent herein.

13. The Supreme Court of Arizona committed prejudicial error in denying appellants' petition for a rehearing.

STATEMENT.

The complaint herein (cf. Trans., pp. 1-3) sets forth a cause of action in form for money had and received, and for no other cause of action. The gist of the cause of action as alleged is that plaintiff and his assignor had commissioned defendants as their agents to purchase a certain mining property in Mexico for plaintiff and his assignor at the "lowest possible price;" that thereafter defendants, *as such agents,* bought the property for $10,000, gold ($20,000, Mexican money), represented to plaintiff and his assignor that they had secured it for them at the lowest possible price, to-wit, $20,000, gold, were paid said last-named sum, and pocketed the difference, to wit, $10,000, gold. It was alleged in the complaint and found by the court that such were the facts, to-wit, that defend-

ants as *agents* had misappropriated $10,000, to-wit, by concealment, were held to have wrongfully converted the said difference of $10,000 to their own use. The findings are explicitly and in form as for money had and received (cf. Findings, Trans., pp. 4 and 5).

Practically all of the allegations of the complaint were controverted by the testimony of the defendants on the stand. In particular they explicitly denied that they had ever agreed to act as *agents* for plaintiff or his assignor. For some reason that we are unable to discover, after a minute examination of the record, the trial court chose to disregard this positive testimony given in open court, though it was controverted by only the testimony of two agents for plaintiff, who gave evidence only by deposition, and whose evidence was not corroborated by written or other evidence. (We refer to the testimony of the two Sandovals *passim*, and to the depositions of Lindsay (Trans., p. 21 *et seq.*), and of Mackay (Trans., p. 10 *et seq.*), but it seems to us unnecessary to argue a point of the weight of evidence—in spite of the fact that the sole support of that vital allegation—the agency of defendants—is in the depositions of two agents for plaintiff who were not produced at the trial. We concede, for the purposes of the points we are particularly urging on this appeal, that the plaintiff and his assignor understood that the defendants were acting as their agents.

There was much contradiction in the evidence.

But there was one fact that never was disputed or controverted throughout the trial. It is the one undisputed fact. It is that at the time when his purported contract of agency was made, to-wit, the spring of 1905 (cf. complaint in Trans., p. 4), and when the written sale was made by the Sandovals to Mackay as agent for plaintiff and his assignor, to-wit, April 5, 1905 (cf. Trans., pp. 57 and 58, particularly the following recitations in the last-namel contract: "P. Sandoval said that he is the legitimate owner, in full domain and possession," of the mine (folio 122) and "P. Sandoval do hereby *sells* to Henry S. Mackay," etc., the same)—at both of these times it is indisputably proved and uncontroverted that P. Sandoval (for himself and brother) was *already the owner* of said mine. (It was contended by defendants on the trial that Mackay well knew this all the time, by virtue of public records, common reputation, etc.—but Mackay denied this in his deposition and we are not now arguing it.) We desire to emphasize here only the fact that the Sandovals were in fact already the owners of the mine before Mackay approached them with a proposition to purchase the same. (The Sandovals contended at the trial that Mackay had made a straight proposition to buy the mine from them, nothing being said as to what the Sandovals themselves had paid for it—and at the trial they freely admitted they had in January, 1905, bought the mine for $10,000 by a contract in writing good under the Mexican

law. Cf. document at p. 56 of Trans. Cf. also the oral evidence of former owners, particularly that of plaintiff's own witness Ortiz. Trans., p. 25 and 26 to the same effect.) In fact, it was undisputed that throughout the matters herein in controversy, the defendants were the owners of the mine.

In spite of the undisputed proof to this effect, *the court gave findings and judgment* to plaintiffs on the theory that the defendants were liable as *agents* as for money had and received. They could not have been agents as they were the owners of the property, and they could be held to be liable only on the basis of fraud (assuming that they had assumed to be agents, notwithstanding their actual ownership). And, furthermore, the value of the mine was not either alleged or proved and there was therefore no measure for damages such as is required in establishing unliquidated damages for fraud. For once it was proven that the defendants were the actual owners of the property—the cause of action for the difference in price was one for fraud or it was for nothing. And, therefore, being necessarily one for unliquidated damages, an action for money had and received would not lie. The complaint as well as the findings are formed exclusively as for money had and received. It is more than a mere variance, or succession of variances—it is a case of a total failure of proof to support the judgment. We proceed now to our points and authorities more specifically.

ARGUMENT.

The points raised by assignments 1 to 4, inclusive, and 9 and 10 may be considered under the general point, to-wit, the fatal variances amounting to a total failure of proof.

The question here is not the ordinary one, to-wit, whether a plaintiff can recover on the common count for money had and received where the plaintiff has employed the defendant as his agent to make a certain purchase and plaintiff by fraudulent misrepresentations is induced to pay to defendant more than the actual price agreed upon between the seller and defendant as agent for plaintiff. In a number of cases which may readily be cited it is held that an agent cannot put himself in a position to make profits out of the subject matter of his agency to the detriment of his principal, by any concealment whatever, and that where he does so the principal is entitled to recover back from him such secret profits. It is not disputed by us that where such are the facts and they are both alleged and proved as alleged the plaintiff may recover such secret profits. We know of no case where the complaint was framed on the ordinary common-law count for money had and received where the fact was that the alleged misrepresentation or concealment consisted solely of the fact that the agent was secretly himself the owner, for in such a case we conceive that the fraud is of

such a nature that the plaintiff is bound in any case to at least put the defendant in the position of a constructive trustee, to-wit, on the ground that having represented himself merely as an agent, though he may actually have been the owner, by allegations expressly alleging that specific situation. In other words, the plaintiff cannot allege in form that the defendant was employed as and acted as his agent for the purchase of the property and after it is proved conclusively at the trial that he was the actual owner all the time then recover upon a pleading based upon the express theory that the defendant was not the owner but was an agent for the purpose of purchasing the property from another owner. But, that in such a situation the plaintiff is entitled to some remedy we, of course, concede. We may even go so far as to concede, for purposes of argument, that where a plaintiff had framed his complaint upon the theory that the defendant was acting as his agent for the purchase of the property and was not the owner of the property, and where it afterwards developed by the proof at the trial that the defendant was the actual owner, nevertheless the court would allow the plaintiff to so amend his complaint to conform to the proof, and to so remodel the form of action as to support a judgment holding the defendant liable as a constructive trustee by reason of the fact that he represented himself to the plaintiff and the plaintiff believed that he was throughout acting merely as an agent. Conceding this last

proposition of law, for the purposes of argument only, we still respectfully insist that even this would not meet the case in hand; for, in the instant case, it was proved at the trial that the defendants were the actual owners of the property while plaintiff alleges they were employed as agents to purchase; but not only did plaintiff not amend his complaint to conform to this proof, but the findings of fact and the judgment are predicated explicitly upon the facts as alleged in the complaint and not upon the facts as they were proved at the trial. Therefore, assuming that the defendants Sandoval might be considered by a court of equity or by any court as constructive trustees and held to the liabilities of agents by reason of their alleged representation of themselves as such, notwithstanding that they were the actual owners of the property, yet both the complaint and the findings of fact must explicitly so hold. We conceive that there can be no doubt about that as a proposition of law.

But in this connection we call this court's attention to paragraph III of plaintiff's complaint (compare paragraph III of complaint, page 2 of Transcript), in which it is alleged that—

> "The said defendants did, acting under the said contract and as agents as aforesaid, negotiate with the owners of the said mining claim and did agree to purchase the said claim from the said owners and to pay therefor the sum of twenty thousand dollars ($20,000) Mexican silver; and the

owners of the said claim agreed to convey the said mining claim to the said defendants for the said sum of twenty thousand dollars ($20,000) Mexican silver; and the said owners of the said claim did, in or about the spring of 1905, in furtherance of said negotiations and agreement, convey the said claim to the defendants, and did receive from the said defendants the said sum of twenty thousand dollars ($20,000) Mexican silver, and no more, and that the said conveyance was accepted by the said defendants for the use and benefit of the said Lindsay and the plaintiff under the said contract as aforesaid."

The findings are to the same effect. It is further noticeable that in the findings it is held that this was done in pursuance of the agreement of agency. (Compare Transcript, page 4, paragraph II, of findings.) In the face of the undisputed proof that throughout this period the defendants Sandoval were the actual owners of the property, it is difficult to see how by any theory of the law or pleading the findings of fact and the judgment based thereupon can be allowed to stand. It hardly needs the citation of authority. But the difficulty in this case for plaintiff (and respondent) is further increased in this regard by the express allegation of the complaint alleging that the agreement of agency was that the defendants Sandoval should purchase the property "at the lowest possible price" (compare paragraph II of complaint). Now, it is an undisputed fact in this case that by a

binding and legal contract the Sandovals did purchase the property from the owners in January, 1905, prior to the period when it is alleged that the plaintiff and his assignor made any arrangements with the Sandovals, or even had approached them at all, for the sum of $10,000. On what basis, then, in view of that undisputed fact, can a cause of action be set forth in the form of a count for money had and received where the alleged term of the alleged contract of agency, to-wit, that alleged provision that the agent should purchase the property for the lowest possible price, could not in view of the then existing facts be by any possibility carried out? If the alleged contract of agency had specified any fixed price, or any maximum or minimum price even, then by the law of constructive trust it might be held that the defendants Sandoval, notwithstanding their actual ownership of the property, would be held in law to a liability as if they had been merely agents, for there would have been a way to exactly fix the price at which they would have been held to have purchased the property as agents; but the use of this last phrase, "at the lowest possible price," though it might not deprive plaintiff of a proper remedy where his pleading was properly drawn, yet it certainly cannot be allowed to be held that the lowest possible price shall be deemed as a matter of law to have been the price at which the Sandovals themselves had several months previous purchased the property. As a matter of fact we contend, of course, that under

the situation here presented plaintiff's only remedy is to prove unliquidated damages and thereby establish the amount of his actual damages arising out of the alleged concealment by defendants of their actual ownership. But at least, in this connection, we repeat that it cannot possibly be contended that the price at which the defendants Sandoval had originally and previously purchased the property themselves can be deemed by any theory of construction or fiction in law as determining what the court must consider the lowest possible price. For that reason, if none other, the complaint as now drawn, on the facts as they stand now proved, cannot possibly support the findings of fact or the judgment in this case.

This brings us to a separate point, to-wit, the point that there is in the record and was at the trial no proof of damages sufficient to support any judgment for damages whatever. We think it is sufficiently clear that, assuming plaintiff to have proved that he did employ defendants as his agents and that they purported to act as such, still under the facts as they were proved at the trial as to the actual ownership of the property plaintiff was limited to an action for unliquidated damages. The measure of damages we conceive to be the difference between what plaintiff gave to the Sandovals for the purchase of the property, to-wit, $20,000, and what the property was reasonably worth on the market. No proof whatever was offered at the trial and no allegations were made in

the pleadings as to the value of the property, whether reasonable, market or otherwise. We refer in this connection to specifications of error numbers 9 and 10. There is a total failure of proof on this head, and we respectfully submit that no findings of fact or judgment could be rendered herein without such proof.

Wilson vs. Haley Live Stock Co., 153 U. S., 39; 38 L. C. P. Ed., 627, seems to be a leading case on the general principles of variance The court there says:

> "It is sufficient to say that we know of no system of pleading which enables a party to declare in trespass *de bonis asportatis* and without at least an amendment of his complaint, recover as upon a count for money had and received."

The opinion then proceeds to add that even in the code States, where the variance goes to the extent that "a cause of action or defense is not proven, not merely in some particular, but in its entire scope and meaning, it is treated by the authorities of those States not as a case of variance merely, but as an entire failure of proof. (See *Volkening vs. De Graaf*, 81 N. Y., 268; 12 Jones & S., 424; *Decker vs. Saltzman*, 59 N. Y., 275.) In *De Graw vs. Elmore*, 50 N. Y., 1, it is held distinctly that the code does not authorize a recovery where the complaint alleges facts showing a cause of action in tort by proving on the trial a cause of action in contract. To the same effect are *Ross vs.*

Mather, 51 N. Y., 108; *Walter vs. Bennett,* 16 N. Y., 250; *Belknap vs. Sealey,* 14 N. Y., 143; 67 Am. Dec., 120; *Bernhard vs. Seligman,* 54 N. Y., 661; *Barnes vs. Quigley,* 59 N. Y., 265; *Farmer vs. Cram,* 7 Cal., 135.

The foregoing California case is cited with approval in the case of *Elmore vs. Elmore,* 114 Cal., p. 521, where the rule is also stated, supported by ample authority, that a variance may be taken advantage of by either objection to evidence or by motion for nonsuit. In the instant case the motion for nonsuit (referred to in our specifications of error) would cover it.

In *Forsell vs. Pittsburgh,* &c., 100 Pac., p. 221, the court says:

> "Speaking technically there is a well-defined distinction between 'variance' and 'failure of proof;' but in the sense in which the terms 'failure of proof' are constantly used—that is, as the equivalent of insufficiency of the evidence—there may not be, and frequently is not, any distinction whatever."

The opinion then cites many instructive instances and authorities, among them Chitty. The court cites, further, authority to the effect that the question (of variance) "could be presented on motion for a new trial under a specification of insufficiency of the evidence to justify the verdict."

In *Bechtel vs. Chase,* 156 Cal., 707, the court says:

"So assuming, it may be conceded that plaintiff had a right of action against Foster for any damage sustained by reason of the fraud practiced upon him. * * * The plaintiff might proceed in any one of various ways to seek relief for the fraud practiced upon him in inducing him to exchange his notes for worthless stock. He might rescind the transaction and recover the notes which he had been induced to turn over; he might perhaps, treating the transfer of the notes as void, recover them or their value without rescission. (*Wendling Lumber Co. vs. Glenwood Lumber Co.*, 153 Cal., 411; 95 Pac., 1030.) He might bring an action for the deceit practiced upon him and recover such damage as he could show to have been suffered by him. In such last-mentioned action the measure of recovery might be the same as that here sought: *i. e.*, that the value which the preferred stock would have had if the false representations made with regard to it had been true. (*Cruess vs. Fessler*, 39 Cal., 336; *Spreckels vs. Gorrill*, 152 Cal., 383; 92 Pac., 1011.) But on no possible theory can it be said that the fact that an exchange of property was induced by a fraud would amount to proof that the property *surrendered was sold to the wrongdoer for an agreed sum of money.*"

And similarly, in the instant case, how can plaintiff recover when he pleads on an express contract (of agency) and founds his findings and judgment on proof that there was no agency possible, but, on the contrary, an alleged fraudulent

concealment of a fact contrary to any possible theory of agency or express contract therefor?

Cf. also *Mullins vs. Lowry* (Mo., 1910), 124 S. W. Rep., 572, holding that a pleading by an agent (representing a buyer in a contract of sale), who subsequently became the owner of the contract, which alleges that the seller was guilty of fraud practiced on the pleader, inducing the contract of purchase, is not sustained by proof that the sale was made to the buyer represented by the pleader as agent, and that the fraud was practiced on him, and there would seem no reason why in any case, in an action sounding in deceit, an owner may, conversely, be treated constructively as the agent, except perhaps where an equitable cause of action for that effect is specified and proved as specified. Herein the theory of the complaint and the theory of the proof are irreconcilable.

Before passing on to the next point appellants contend that there were not only many variances, as pointed out in the specifications of error, but that these variances amounted to a total failure of proof.

Plaintiff and his assignor are estopped to maintain this action, and, further, are guilty of laches.

We refer herein particularly to specification of error No. 8.

Plaintiff and his associates had knowledge as early as the spring of 1905 of the fact that the

Grijalvas and Ortiz had sold the property to Prospero Sandoval for twenty thousand dollars, Mexican money.

The cause of action, in order to support a judgment in this case, necessarily involves ignorance on the part of the principals of the purchase price at which the alleged agents obtained the property up till the time when plaintiff and his associates might have withdrawn from their arrangements without injury to themselves. It needs no citation of authority also to the effect that the knowledge of the agent is the knowledge of the principal, and that any knowledge possessed by Mackay is necessarily imputable to his principals (except, of course, in a possible action between Mackay and his principals). That Mackay had knowledge and the means of knowledge of the real price at which the Grijalvas and Ortiz had parted with the property before the plaintiffs had parted with one cent of money is clear beyond any doubt from Mackay's own testimony. But before pointing out such testimony we desire to call this court's particular attention to the fact that the trial court saw fit to pass a judgment on the sole and solitary testimony of this witness, Mackay, who never appeared in court and whose character and credibility were in no way examined by the trial court, and whose credibility can in every way be as accurately determined by this appellate court as by the trial court—a witness who describes himself as an architect in San Francisco, but for two years or there-

abouts prior to the trial of this action engaged in the business of picking up mining claims in Sonora, Mexico. As the trial court therefore did not personally see Mackay in court, this court has the right to pass on the credibility of Mackay's testimony as if it were the trial court itself. But it seems to us astonishing indeed that such testimony is believed and the judgment is predicated on such testimony unsupported in a vital point by that of any other witness, whether present or absent from court, where his testimony on such vital point is inherently improbable. It is undisputed on all hands that the defendants were the owners, or in effect the owners, of this property during March and April, 1905. What possible motive then could they have for the misrepresentations alleged to have been made by them? Why would they not have told Mackay, Randolph, and Lindsay that they were the owners or controlled the mine and would themselves sell it to them? Was it not likely that such a statement would be to their interest to make it and isn't it perfectly obvious that they could in their own names demand a very much higher price for the property than they could in the name of some poor and impecunious Mexicans, who, as Mackay testified that Sandoval said, were to be induced to part with their property on coming to the town of Nogales, getting on a spree, and thereupon being so much in need of cash that they would part with their properties for almost nothing? Prospero Sandoval himself testified posi-

tively that neither he nor his brother ever heard of any contract of agency as to that; that they would not have listened to such a contract as they were themselves selling the property. It is claimed that they did not disclose the price which the Grijalvas and Ortiz had sold for. This is the very reason they did not disclose it, for, as Prospero Sandoval said, what business was it of plaintiff or his associates what price Prospero Sandoval had obtained it for from the Grijalvas and Ortiz? What motive also could Prospero Sandoval have for undertaking a contract of agency to purchase property which he knew he owned and when, therefore, he knew there could be no means of determining what was the lowest price at which the Grijalvas and Ortiz would have sold the property for in March or April? Moreover, Prospero Sandoval knew of Mackay's activity in that country and knew that he could find out all about those facts involving title and selling price if he so desired. And therefore if Sandoval had had any intention of selling the property to Mackay for a lower price than Mackay believed that the Grijalvas and Ortiz would sell it for, in common caution he would by the very terms of his agency, if there had been any such, have insisted on some price more or less approximate instead of leaving it in the vague form, "the lowest possible price." But Mackay himself testifies as follows:

> "Yes, I did have a conversation with Mr. P. Sandoval the *latter part of May*, 1905, in

> respect to the purchase of the San Francisco mine at Nogales, Sonora, Mexico. I asked Mr. Sandoval about the fact that he had purchased the mine for $20,000 Mexican money and represented to me that it was costing $20,000 gold" (folio 38, p. 17, Trans.).
>
> "I do not remember in detail the substance of this agreement between P. Sandoval or P. Sandoval & Company and the Grijalvas other than it stated that the full price of the mine was $20,000 Mexican money." (The agreement referred to being dated March 21, 1905, and being on record at Altar, Mexico, whence Mackay secured the certified copy (folio 1, p. 19, Trans.)).

Cf. also the exhibits printed in the transcript of record and the testimony of P. Sandoval *passim*.

Cf. also the erroneous ruling of the trial court (folio 82, p. 38, of Trans. of Record) in ruling out evidence of defendants on this point.

Cf. also the rest of P. Sandoval's testimony, pp. 39-44.

The witness Gayov also testified:

> "When Grijalvas spoke to me about it he told me that it was compromised with Mr. Sandoval, and, of course, I must have said it to Mr. Mackay," etc. (cf. folios 99-100, p. 47, of Trans.).

In short, it is incredible that Mackay did not all along know the true condition; and therefore it is

incredible that there ever was any such contract of agency as Mackay testified to.

Moreover, Mackay testifies that the alleged employment of P. Sandoval as agent was by a written agreement! This written agreement, so necessary to support Mackay's otherwise unsupported testimony, was never produced at the trial. Mackay testified that he had given it to Mr. Ives, but it never appeared why Mr. Ives did not produce it. Mr. Ives chose to rely on secondary evidence of its contents. The rule, therefore, applies to such oral testimony of Mackay's that where a party chooses to introduce secondary evidence and not the best evidence, then the court must presume that the best evidence was not introduced because it would have been adverse. And the enforcement of this rule of evidence is mandatory and not discretionary. The refusal to so instruct a jury, for example, would be reversible error on appeal.

Whether or not Mackay communicated this testimony to Randolph and Lindsay is immaterial in this case, for the reason that the law must assume that he did. If this is so, knowledge of plaintiff and Lindsay dated at least as far back as March or April, 1905. As the action is necessarily one grounded in fraud, and as it must necessarily be pleaded as such, it follows that the action cannot be maintained by plaintiff, for the reason that his agent had knowledge of the fraud, if there actually was any, prior to the payment of any money whatever on the purchase price, and prior

certainly to the payment of the second installment. The evidence, therefore, will not sustain the findings in this case, nor would it sustain any judgment whatever in this case, proof by plaintiff's own witnesses showing conclusively that the plaintiff's agent Mackay knew of the actual price prior to the transfer of said property to Mackay.

St. John *vs.* Hendrickson, 81 Indiana, 350:

"When a party with full knowledge of all the material facts does an act which indicates his intention to stand to the contract, and waive all right of action for fraud he cannot maintain an action for the original wrong practiced upon him, and where he declines to repudiate a transaction known to him to be fraudulent and fully and expressly ratifies it, he can neither rescind nor maintain an action for damages."

Schmidt *vs.* Mesmer, 116 Cal., 267.
Oppenheimer *vs.* Cluny, 142 Cal., 313.
Pomeroy's Equity Jurisprudence, sections 897, 917, 965, and cases cited.

"Where fraudulent representations are made concerning the sale of real estate it must appear that the person defrauded was not so situated as to discover by ordinary diligence the untruthfulness of the statements."

Smith on the Law of Frauds, sec. 236.

Furthermore, it is a fact, and the Supreme Court of Arizona so states in its opinion (compare page 60 *et seq.* of Transcript), that the twelve thousand dollar payment made by plaintiff and his associates to defendant in May, 1906, included all excess over the price actually paid to Ortiz *et al.* (the owners of the property prior to the Sandovals), for which excess this action was brought. If it is established, therefore, that the present cause of action is to recover a sum of money paid in May, 1906, four months after the discovery by the plaintiff himself (compare plaintiff's allegation in complaint) and about a year after the discovery by plaintiff's agent, Mackay, of the fact that there was paid only $10,000 gold for the property by the Sandovals, then it is clear that plaintiff cannot recover anything. For it is elementary law that money paid voluntarily by one party to a contract after the discovery of fraud in the other party to the contract is a waiver of such fraud unless the payment is necessary to protect the innocent party in his rights. In this case plaintiffs, of course, have contested that plaintiff and his associates could not have refused to pay anything above $10,000, assuming their version of the facts to be true—for they had already been secured in the property (and even if they had not been so secured they could have enforced it).

The trial court committed prejudicial error in denying appellants' motion to amend their answer and specifically plead the statute of limitations applicable thereto.

We refer particularly to specification of error No. 7. The statute of Arizona therein referred to is the following, to wit:

> "There shall be commenced and prosecuted within one year after the cause of action shall have accrued, and not afterwards, all actions or suits, in court, of the following description:
>
> * * * * * * *
>
> "5. An action for relief on the ground of fraud or mistake, the cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

The complaint itself does not disclose the fact that plaintiff's cause of action was barred by the statute of limitations. On the contrary, the complaint alleges specifically that neither plaintiff nor Lindsay knew of the actual selling price until about the month of January, 1906. The first evidence in this case which negatived this allegation of plaintiff was the evidence of Mackay himself, and therefore defendants' application for leave to amend, pleading the bar of the statute of limitations, was entirely seasonable and should have been granted. It was the first occasion which the defendants had

on which to plead the statute of limitations. Appellee's counsel states that the evidence of Mackay to that effect had already been introduced on deposition prior to the trial, but this contention is entirely without merit, for the reason that a deposition is of course not evidence in a case until it is actually introduced in evidence, and that defendants had no means whatever of knowing that Mackay's deposition would be introduced, particularly as they must have supposed that the most important witness for plaintiff would be personally present in court, especially as the very region of his activity was close to the place of trial. Moreover, the amendments could not have possibly prejudiced plaintiff by reason of the lateness of the application, inasmuch as the amendment involved the pleading of a fact expressly proved by plaintiff's own witness, and one for which it must be presumed he needed no time to adduce further evidence, inasmuch as under the very facts of the case (Mackay and Sandoval being alone present at the interview) no further testimony could possibly be produced by plaintiff on the point. The denial of this application for this amendment, therefore, seems to defendants a gross abuse of discretion, vitally prejudicing the rights of the defendants. The authorities cited by appellee's counsel are merely to the effect that an amendment will not be allowed during the trial where the party proposing the amendment does not state exactly what he proposes to allege and prove by his amendment. In

this case defendants did not propose to introduce any further testimony on that point and plaintiff *could* not. That the statute of limitations has long been the plea favored by courts of law needs no citation at this late day. This is particularly so in an action of this sort, where the utmost diligence should be required of plaintiff in proceeding to claim back alleged secret profits which he had long been aware of, which he had practically ratified and approved in fact, where the situation of defendants had changed, where the property involved in controversy had proved not to have been of the value expected after long-continued experimentation by plaintiff and his associates—where, in fact, plaintiff and Lindsay were guilty of the utmost laches and where, if ever, a statute of repose should have been given its full force and effect.

Perrin *vs.* Malory, 8 Ariz., 407.

Provision of Code allowing amendments to be made in the discretion of the court should be liberally construed and should be allowed in the furtherance of justice.

In this connection, as to the credibility of Mackay, it must be further observed that his means of information were so complete and full, and that if he did not use such means of information he was simply wasting his time in being in that country at all, that it must be presumed in law that he had such knowledge. If he did not look into the chain of title which necessarily in-

volved, under the Mexican law, a statement of the price of the successive sales (and it must be presumed, of course, in law, in the absence of evidence to the contrary, that the legal document correctly recites the real price where the law requires such, as it does in Mexico), then Mackay certainly was guilty of incredibly gross negligence, and Mackay's principals must be held responsible for the consequences thereof.

That, under the facts of this case as developed at the trial, the cause of action is necessarily one of fraud, if anything, and that it must be pleaded as such, we have already shown. That the one-year limitation therefore applies is too clear for argument.

Lindsay's cause of action, if any, was not assignable to plaintiff herein as a matter of law.

We refer particularly herein to specification of error No. 6.

That a cause of action necessarily grounded in fraud where it must be pleaded expressly as fraud is not assignable is overwhelmingly proved by the authorities. There are some cases going to hold that a cause of action sounding in fraud of a certain character which will allow a count for money had and received to lie for its recovery may be assigned. But an examination of these cases will disclose the fact that such assignable causes of action are invariably those arising out of injuries

to property and through breach of contract. In this case there was, of course, no injury to the property, inasmuch as no representations as to the intrinsic value of the mine is claimed to have been made by the Sandovals, and inasmuch as no misrepresentation as to the condition of the title is claimed to have been made by the Sandovals. The alleged misrepresentation as to price, particularly as it occurred subsequent to the alleged contract of agency, is a purely personal injury, if it is anything. But this matter is settled in this case conclusively by the fact that the evidence on which the findings and judgment in this case must rest makes out a case, if any case at all, which is necessarily one purely in fraud and in which an action for money had and received could not possibly lie by reason of the fact that the damages are necessarily unliquidated. That a cause of action arising out of such facts can be assigned will therefore hardly be contended.

Moreover, it appears in the abstract of record in the evidence of plaintiffs' own witnesses that Mackay himself had an interest (though only a contingent one) in the property and therefore in the cause of action arising out of the sale thereof, and also that Lindsay, Randolph, and Mackay were acquiring property merely for the purpose of turning it over to a corporation, which was subsequently done. No pretended assignments of the interest of Mackay or of this corporation are given anywhere in the record, and therefore under the

evidence it must be held that the pretended assignment by Lindsay to Randolph is absolutely void for any and all purposes, whether evidence thereof were objected to or not. It also appears that Randolph, the plaintiff, has no cause of action himself, for the reason that the mine was transferred to the company subsequently, and that no record of a pretended transfer by the company to Randolph occurs. As we understand the evidence, the only person under the evidence in the case who could recover against defendants would be the corporation to which the property was afterwards transferred, to-wit, the owner thereof, at the time of the commencement of the action.

The following authorities support this argument:

> "The general doctrine, both at law and in equity, is that a right of action for a pure tort is not the subject of assignment."
>
> A. & E. Ency. of Law, Vol. 2 (2d Ed.), p. 1020.

> "A right of action arising from fraud or deceit practiced on the assignor is not generally assignable (*Tufts vs. Matthews,* 10 Fed., 609; *Carroll vs. Potter,* Walk. (Mich.), 355; *Morris vs. Morris,* 5 Mich., 171; *Brush vs. Sweet,* 38 Mich., 574; *Dickinson vs. Searer,* 44 Mich., 624; *Dayton vs. Fargo,* 45 Mich., 153; *Lewis vs. Rice,* 61 Mich., 97; *Stebbins vs. Dean,* 82 Mich., 385; *Smith vs. Thompson,* 94 Mich., 381; *Zabriskie vs. Smith,* 13 N. Y., 322; 64 Am. Dec., 551; *Hyslop vs. Randall,* 11 How. Pr., 97; 4 Duer, 660; *Shoemaker vs. Keeley,* I Yeates

(Pa.), 245); but where the injury affects the state of the party injured, so that the right of action would survive to his personal representatives, it may be assigned" (cases). *Id.*, p. 1023.

Cf. Story's Eq. Jurisprudence, sec. 1040 G.

Emmons vs. Barton, 109 Cal., 662.

Graham vs. R. R. Co., 102 U. S., 154.

In *Mullinax vs. Lowry,* 124 S. W. Rep., p. 573, which was an action grounded in deceit and misrepresentation as to certain goods sold, the court says:

> "Can an action for fraud and deceit practiced upon the assignor be maintained by the assignee for the purpose of recovering damages arising from the deceit practiced upon the assignor? The law is that it cannot." (Citing *Harrison vs. Craven,* 188 Mo., 590; 87 S. W., 962.)

For all of which defects appellants respectfully submit that the judgment of the Supreme Court of Arizona herein should be reversed.

Respectfully submitted,

G. BULLARD,
LAWLER, ALLEN, VAN DYKE & JUTTEN,
HENRY S. VAN DYKE,
Attorneys for Appellants.

FRANK P. FLINT,
HENRY S. VAN DYKE,
Of Counsel.

IN THE

Supreme Court

OF THE

United States

A. Sandoval and P. Sandoval.,
Appellants,

vs.

Epes Randolph,
Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The facts in this case as found by the court of original jurisdiction are, briefly stated, as follows:

In the spring of 1905 the appellants, A. Sandoval and P. Sandoval, entered into an agreement with the appellee, Randolph, and one Lycurgus Lindsay, whereby the Sandovals agreed that

they, acting on behalf of Randolph and Lindsay, would undertake to purchase for Randolph and Lindsay a mine called the San Francisco, in the Altar Mining District, state of Sonora, Mexico, at the lowest possible price. Pursuant to this agreement, and acting on behalf of Randolph and Lindsay, the Sandovals did purchase the mine from the owners thereof and paid therefor the sum of twenty thousand dollars Mexican silver and no more, and caused a conveyance of said mine to be made to one H. S. McKay, who was the agent of Randolph and Lindsay for that purpose. In the belief that the Sandovals had paid for the mine the sum of twenty thousand dollars ($20,000.00) in money of the United States, Randolph and Lindsay paid to them that amount in American gold in three separate installments, the last installment being paid on May 25th, 1906, in the sum of twelve thousand dollars ($12,000.00). The sum of twenty thousand dollars Mexican money paid by Sandovals to the original owners of the mine, was worth in American money only the sum of ten thousand dollars ($10,000.00), leaving ten thousand dollars ($10,000.00) in money of the United States in the hands of the Sandovals after paying the full purchase price of the mine. This action was brought by Randolph against the Sandovals to recover this amount, Lindsay having prior to the

commencement of the action assigned his interest in the claim to Randolph.

The contention of the Sandovals was that they had bought the mine for their own use and had sold it to Randolph and Lindsay at a profit. The only substantial issue was the issue of fact raised by their denial that they purchased the mine as agents of Randolph and Lindsay; and this issue having been determined upon conflicting evidence against them, their appeals to the Supreme Court of Arizona and to this court were totally without merit and obviously taken for delay.

The action was commenced on November 26th, 1906, in the District Court of Santa Cruz county, Arizona. Process was served on the defendant on the 30th day of January, 1907, within that county, and on February 12th, 1907, they filed their answer to the complaint. This answer consisted of, first, a demurrer, on the ground that the court had no jurisdiction over the persons of the defendants or the subject of the action, and, second, a general denial of the allegations of the complaint.

The demurrer having been overruled, the action went to trial and resulted in a judgment for the plaintiff for the amount claimed. Findings of fact and conclusions of law were made by the trial court, in which the facts were stated substantially as above. [Transcript of Record, pages 4 and 5.]

From this judgment an appeal was taken to the Supreme Court of the territory of Arizona, and that court, on the 27th day of March, 1908, affirmed the judgment appealed from, the opinion of the court being delivered by Mr. Justice Doan. [Transcript of Record, pages 60 to 64.] (11 Ariz. 371.)

ARGUMENT.

The record contains no assignment of errors as required by section 997, Revised Statutes, U. S. It is recognized that this is not sufficient to justify a dismissal of the appeal under former decisions of this court, provided assignments of error are contained in the appellants' brief as provided by rule 21. Nevertheless, in the absence of such assignments of error from the record, counsel for the appellee is compelled to speculate upon what questions are intended to be urged upon this appeal.

The Act of April 7th, 1874, (18 Statutes at Large, 27) limits the jurisdiction of this court to the inquiry whether the findings of fact made by the court below support its judgment, and to a review of exceptions to rulings upon the admission or rejection of evidence. The rule established by the statute has always been rigidly adhered to by this court, its latest utterance upon the subject being Eagle Mining and Improvement Company v. Hamilton, 218 U. S. 513.

The testimony is set forth in full in the record, but its sufficiency to sustain the findings of fact cannot be considered by this court. Only one ruling of the court was excepted to [Transcript of Record, page 31] and even that exception was not considered upon the appeal to the Supreme Court of the territory. In fact, no ruling of the trial court upon the admission or rejection of evidence was presented to or passed upon by the Supreme Court of the territory and hence no such matters are presented here. On appeal from the Supreme Court of a territory, the inquiry is only in relation to the matters presented to and reviewed by the Supreme Court of the territory.

Montana Railway Company v. Warren, 137 U. S. 348;

Shawnee Compress Company v. Anderson, 209 U. S. 423.

The Supreme Court of the territory made no formal statement of facts in the nature of a special verdict, but the judgment of the trial court having been affirmed generally, the findings of fact made by that court serve the purpose of the statement of facts required by the statute.

Eagle Mining and Improvement Company v. Hamilton, *supra*.

The question is, therefore, whether the findings of fact made by the trial court sustain the judgment. Upon this question there would seem to

be no possible doubt. Upon the facts found the appellants were the agents of Randolph and Lindsay to purchase the mine referred to for the lowest possible price. Under this agency it was their duty to purchase the mine for the least price possible, and the law would not permit them to make any profit upon the subject matter of the agency. No claim of compensation for services rendered is involved in this case, the sole question being whether these agents had any right to receive from their principals more money than was used by them for carrying out the purposes of the agency. Whatever conflict there may have been in the evidence has been resolved by the findings of fact made by the trial court, and, in legal contemplation, adopted by the Supreme Court of the territory, and upon these facts the law is entirely clear.

Bain v. Brown, 56 N. Y. 285;
Crump v. Ingersoll, 44 Minn. 84, 46 N. W. 141;
Rorebeck v. Van Eaton, 90 Iowa 82, 57 N. W. 694.

The rule upon this subject is fully stated and a large number of authorities cited in

11 Am. Eng. Ency. of Law, Second Edition, pages 1071-2-3.

Upon the facts found, therefore, there can be no doubt that the moneys paid to the appellants

and not used by them in the purchase of the property referred to remained the property of Randolph and Lindsay, and that Randolph as sole owner of the money by virtue of the assignment from Lindsay had a clear right to recover this money if the agents declined to pay it over.

The above principle and authorities cited in its support would seem to dispose of the only question that could possibly be raised upon the appeal to this court. No other question can be raised under the decisions of this court above cited.

Nevertheless, other questions may be attempted to be presented and, in the absence of any assignments of error it can only be supposed that other questions presented in the Supreme Court of the territory, may be sought to be presented here. Much was said in the briefs presented to the court below as to the sufficiency of the evidence to sustain the judgment appealed from, and as to the effect of the evidence, both oral and documentary, and of the various transactions between the parties. Much also was said as to the meaning and effect of the various written instruments, in both the Spanish and English languages, introduced in evidence. But all these instruments and transactions were merely evidential and bore only, if they had any effect at all, upon the ultimate fact of agency found by the court against the appellants. Whether either the trial or the Supreme Court failed to give proper effect to any of these

evidential matters, this court is powerless to determine. The sole question upon this appeal is, whether the facts as found, standing by themselves and without reference to the evidence, sustain the judgment rendered.

Eagle Mining and Improvement Company v. Hamilton, *supra.*

In this statement will be found a complete answer to many matters that may be pressed upon the court with respect to what the evidence tends to prove or disprove.

Some other matters, however, were presented to the Supreme Court of the territory wherein it was claimed that the trial court erred to the prejudice of the appellants, and these may be briefly stated as follows:

1. That the trial court had no jurisdiction of the subject matter of the action of the persons of the defendants.

2. That the cause of action was barred by the statute of limitations of Arizona.

3. That the trial court erred in not permitting an amendment to the answer setting up the statute of limitations.

4. That the complaint did not state facts sufficient to constitute a cause of action.

None of these matters can be considered by this court under its limited power of review. They are so palpably wanting in merit, however, that it

is entirely unimportant whether the court considers them or not.

Upon the first of these questions all that need be said is that the District Court of Santa Cruz county, Arizona, is a court of general jurisdiction, and undoubtedly has jurisdiction of causes of action of the character set forth in the complaint in this case.

The statutes of Arizona, with respect to the District Courts, provides that "their original jurisdiction shall extend to all civil cases where the amount exceeds one hundred dollars, exclusive of interest."

Paragraph 1224, Revised Statutes of Arizona, 1901.

As to the second of the above suggestions, the court acquired jurisdiction of the persons of the defendants both by actual service of process within its jurisdiction and their voluntary appearance in the case.

The cause of action sued upon was clearly transitory and could be brought in any court having jurisdiction of the subject matter where process could be served upon the defendants. The objections to the jurisdiction of the court are too frivolous to merit the consideration they received in the Supreme Court of the territory.

With respect to the refusal of the court to permit the defendants to amend the answer, a purely

discretionary matter was presented which could only be considered in the Supreme Court of the territory upon a plain showing that the discretion of the court had been abused and not at all in this court. Upon the merits of the proposition, however, it is plain that the trial court did not abuse its discretion and that the attempted amendment would have been of no avail because the cause of action did not accrue until within one year before the commencement of the action as stated by the Supreme Court of the territory in its opinion.

The mere perusal of the complaint shows that it states a good cause of action by a principal against agents for the recovery of money belonging to the principal and wrongfully withheld by the agent. The allegations that the conduct of the agent was fraudulent were entirely unnecessary and wholly unimportant and in no way change the character of the cause of action.

Frishmuth v. Farmer Loan and Trust Company, 107 Fed. 169;

Seitz v. Seitz, 69 N. Y. S. 170, 59 Appel. Div. 150.

The construction of the territorial statute of limitations (Act No. 16, Laws of Arizona, 1903) and the ruling of the Supreme Court of the territory that that statute had no application to the cause of action sued upon in this case, dispose of any question with reference either to the bar

of the statute or the correctness of the ruling of the court in refusing the proposed amendment. In a long series of decisions this court has uniformly declined to disturb the construction of a territorial statute by the territorial court, and has, in effect, given to the construction of territorial statutes by territorial courts the same weight as the construction of state statutes by state courts.

Copper Queen Consolidated Mining Company v. Arizona, 206 U. S. 474.

The appeal in this case is so obviously frivolous and taken merely for the purpose of delay that it presents a proper case for the imposition of damages for the delay under section 1010, Revised Statutes U. S., and rule 23 of the rules of this court. There is not a single question which can possibly be presented which can be said to be fairly debatable. Upon the facts found by the trial court and adopted by the Supreme Court of the territory the conclusion drawn is inevitable. It is not pretended that there were any errors in the admission or rejection of evidence which could warrant this court in reversing the judgment. Without having seen any brief that may be filed by appellants, counsel for the appellee feels safe in saying that the only discussion contained therein is of matters which cannot be considered by the court, or with respect to matters which are too plain to admit of discussion. The

only possible effect of the appeal in this case is to keep the appellee from realizing the fruits of his judgment for about three years, and if, in any case, the penalty provided by the statute and rule above mentioned ought to be imposed, this would seem to be such a case. It is one of the cases where counsel for the appellee ought to be stopped by the court if he attempted to make an oral argument because no such argument would be necessary. The appellee asks, therefore, that damages in the amount of ten per cent of the judgment, in addition to taxable costs, be awarded.

Nelson v. Flint, 166 U. S. 277;
The Texas & Pacific Railway Company v. Volk, 151 U. S. 73;
Gregory Consolidated Mining Company v. Starr, 141 U. S. 222.

Respectfully submitted,

EUGENE S. IVES,
Attorney for Appellee.

Tucson, Arizona, February 1st, 1911.

SANDOVAL *v.* RANDOLPH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 4. Submitted October 26, 1911.—Decided December 4, 1911.

A principal betrayed by his agent into paying for property an excess over the price for which the agent obtains it may declare in assumpsit without relying upon fraud and deceit in an action for damages.

An agent who makes a secret profit in the execution of his agency may be compelled to disgorge in an action upon implied promise.

Where one agrees to act as agent to purchase property at not exceeding a specified price, he cannot avail of an unexpired option antedating the employment to purchase the property at a less price himself and make the difference.

An agreement to sell at a price paid with right of redemption within a specified period with further agreement not to redeem if an additional sum be paid within that period simply amounts to an option.

11 Arizona, 371, affirmed.

THE facts are stated in the opinion.

Mr. Henry S. Van Dyke and *Mr. Frank P. Flint*, with whom *Mr. G. Bullard* was on the brief, for appellants.

Mr. Eugene S. Ives for appellee.

Memorandum opinion by direction of the court. By MR. JUSTICE LURTON.

Action for money had and received for the use of the plaintiff. A jury was waived and there was judgment for plaintiff upon a special finding of fact. This judgment was affirmed by the court below, the court holding that there was evidence supporting the findings of fact, and that when

that was the case the court could not go behind the facts so found.

The facts so found were in every essential respect the facts stated in the complaint. They were, in substance:

1. That the plaintiff procured the defendants to negotiate with the supposed owner of a silver mine in Mexico, and buy it from the owner for the lowest possible price for the plaintiff and another, who had since assigned his interest to the plaintiff.

2. That the defendants did thereafter bargain for the property and did buy the same at the price of twenty thousand dollars, Mexican silver, taking the title to one of them.

3. That the defendants represented that they had agreed to pay twenty thousand dollars in American money for the mine, and that the plaintiff, believing this to be true, paid over to the defendants the full sum of twenty thousand dollars in American currency, which was the equivalent of twice the sum which the defendants had actually agreed to pay and did later pay for the said property.

The action was in debt to recover this excess over the cost of the property, as money had and received for the use of the plaintiff.

It would be a great scandal if a principal thus betrayed by his agent might not declare in assumpsit without relying upon fraud and deceit in an action for damages. And so the court below held was the law, and that such was the action, notwithstanding the conduct of the Sandovals was characterized as deceitful and fraudulent.

Neither is it now contended that an agent who makes a secret profit in the execution of his agency may not be compelled to disgorge and required to do so in an action upon an implied promise.

Neither do the appellants now deny that there was abundant evidence to support the finding that they did

agree to act as the plaintiff's agents and to buy for him from the supposed owner the mine they did buy; nor do they now deny that they represented to the plaintiff that they had bought the property for him at the price averred, when in fact they had paid for same only one-half that price.

What they do say is, that as a matter of law there was no relation of principal and agent, since there was conclusive evidence that they were themselves the owners of the property at the time they agreed to act for the plaintiff in buying it. Upon this hypothesis it is said that there is no evidence to support a judgment grounded upon their liability for a breach of duty as agents, since one may not act as agent for the buyer in the sale of property of which he is himself the sole owner.

But the finding of fact was that the defendants, after agreeing to purchase in behalf of the plaintiff, "*and in pursuance of that agreement*, purchased the said mining property," etc. This finding is a flat contradiction of the claim that they were the owners when they agreed to represent the plaintiff in buying the property. We lay out of consideration, in the present situation of this case, all conflicting oral evidence relating to the agreement. There is left only what is said to be conclusive documentary evidence to support the claim. But that does not do so. It consists in a contract antedating the agency agreement, by which the real owners, Ortiz and two others, agreed to sell the mine in question to one of the Sandovals, in consideration, with right of redemption within six months, of one thousand and sixty pesos, Mexican, with the further agreement that they would not exercise the right of redemption if Sandoval should pay to them "the further consideration of the sum of twenty thousand Mexican pesos." This was nothing more than an option, of which Sandoval availed himself in time, and while executing his agreement of agency.

Every other suggestion of error hinges upon this alleged inability to act as agent, or upon points of procedure clearly foreclosed by the rulings of the Arizona courts.

Judgment affirmed.